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Arakelian Enterprises, Inc. d/b/a/ Athens Services *and* Teamsters Local 396. Cases 31–CA–223801, 31–CA–226550, 31–CA–232590, and 31–CA–237885

April 22, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND EMANUEL

On December 30, 2019, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision, and on January 3, 2020, he issued an errata. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed an answering brief to each, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

This case concerns whether the Respondent violated Section 8(a)(5), (3) and (1) of the Act in numerous respects during the course of a decertification effort by some of its employees. The judge found that the Respondent violated Section 8(a)(1) by engaging in and creating an impression of surveillance on July 12, 2018, and by orally promulgating a rule on July 12, 2018, prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms. He also found that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union over the effects of its August 2018 decision to close the training room and prohibit employees from using it during their break periods.[3] The judge dismissed the remaining allegations in the case. The General Counsel and the Charging Party except to several of the judge's dismissals.[4] Having fully considered the parties' arguments, we adopt the judge's dismissals in all respects except one. As discussed below, we reverse the judge to find that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with notice and an opportunity to bargain over its August 2018 decision to prohibit employees from using the training room during breaks.

I.

The Respondent, a waste collection provider, operates various facilities in the Los Angeles area, including the Pacoima Yard facility at issue here. Teamsters Local 396 has represented a unit of employees at Pacoima since 2017. Employees at the Pacoima facility regularly took evening meal breaks in a room that the Respondent used to conduct training and safety meetings. This room was not locked or restricted to work meetings, and the Respondent did not use it after 6 p.m. when employees began their breaks. The training room had tables, a sink, a timeclock, and a microwave that a supervisor had provided for employees to use. The Respondent's managers—who were aware that employees used the training room as a break area—never told employees that they could not use the room for breaks or prevented employees from using it.

On August 2, 2018, a dispute arose between the Respondent and the Union over the use of the room by the Union's representatives. Specifically, the Respondent took issue with the fact that employees used the training room as a venue to meet with a union-represented worker who was employed by the Respondent's competitor after the Respondent had previously directed the Union not to bring unauthorized competitor employees on to the property.[5] The judge found that the Respondent "reasonably believed that the union representatives were trespassing and otherwise refusing to comply with security and management directives." The following day, the Respondent locked the door to the training room and told employees that they could no longer take breaks there; the Respondent stated that, going forward, the room would be used

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the judge's conclusions of law consistent with our findings herein. We have also added a remedy section (as the judge inadvertently failed to include one in his decision) and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

[3] In the absence of exceptions, we adopt the judge's findings of these violations. As a result, we find it unnecessary to pass on whether the Respondent separately violated Sec. 8(a)(1) by promulgating its rule prohibiting employees from speaking to union representatives off the property in response to union activity, as finding this additional violation would not materially affect the remedy.

[4] No party has excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) by engaging in regressive bargaining beginning in March 2019.

[5] Member Emanuel observes that it is not alleged, nor would he find, that the Respondent violated the Act by excluding representatives of the Union and unauthorized competitor employees from its facility.

only for training and safety meetings and as a safe room in active shooter situations.

The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) by closing the room without providing the Union with notice and an opportunity to bargain. The judge found that the Respondent's closure of the room constituted a material, substantial, and significant change of employees' terms and conditions of employment. He concluded, however, that the Respondent had no duty to provide notice or bargain about this change because "extenuating circumstances"—namely the Union's "refus[al] to comply with a variety of management and security directives"—provided a sufficient justification for the Respondent to act unilaterally. Accordingly, he dismissed the allegation.[6]

II.

We disagree and find that the Respondent violated Section 8(a)(5) and (1) by closing the training room without providing the Union with notice and an opportunity to bargain. As an initial matter, we agree with the judge's unexcepted-to finding that the Respondent's closure of the training room—which employees had regularly used, with the Respondent's approval, as an area to eat and take breaks—constituted a material, substantial, and significant change in employees' terms and conditions of employment.[7]

In making this change, however, the Respondent was not excused from its statutory obligations under Section 8(a)(5) and (1) to provide the Union with notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense.[8] There are certain compelling considerations that the Board has recognized as excusing bargaining entirely about certain matters, but "the Board has limited its definition of these considerations to extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *RBE Electronics*, 320 NLRB 80 (1995), quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (internal quotations omitted). Here, the Respondent admits there was no economic exigency, and its only asserted basis for making the unilateral change—"the Union's trespass and refusal to stay out of what [the Respondent] perceived, in good faith, to be a working area—does not fall into this exceptional category.

The Respondent argues that, as a matter of law, "an employer does not violate the Act when it implements a unilateral change in response to a union's unprotected conduct." But the cases that the Respondent relies on—none of which even involve unilateral change allegations like the one here—fail to support this proposition.[9] Even assuming that the Respondent had a reasonable belief that employees had used the training room improperly, the Respondent would not have been excused from its statutory obligation to provide notice and an opportunity to bargain over its decision to close the room. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally closing the training room.[10]

AMENDED CONCLUSIONS OF LAW

1. Arakelian Enterprises, Inc. d/b/a Athens Services (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 396 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) by placing employees under surveillance, and creating the impression of surveillance, while they engaged in union or other protected concerted activities at the Pacoima facility on July 12, 2018.

4. The Respondent has violated Section 8(a)(1) by orally promulgating a rule on July 12, 2018 prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms.

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[6] As noted, no party excepts to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to bargain with the Union over the effects of its decision to close the training room.

[7] See, e.g., *Indiana Hospital*, 315 NLRB 647, 655 (1994) (finding that employer made a material, significant, and substantial change by prohibiting employees from taking breaks and eating meals in powerhouse area). The Respondent's assertion that the training room was a "working area" is irrelevant in light of the fact that it had long permitted employees to use the room as a break area.

[8] *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 3 (2019).

[9] The Respondent cites cases involving the question of whether an employer's general statutory duty to bargain continues while employees engage in unprotected economic pressure—an entirely different legal issue than the one presented here, where the Respondent initiated a specific material change in response to an isolated incident outside the context of negotiations. Cf. *Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 368 (1952); *Valley City Furniture Co.*, 110 NLRB 1589, 1592 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

[10] Because we find that the Respondent violated Sec. 8(a)(5) and (1) by closing the training room, we find it unnecessary to pass on the allegation that the closure also violated Sec. 8(a)(3), as finding this additional violation would not materially affect the remedy.

Chairman McFerran would find that the Respondent's closure of the training room also violated Sec. 8(a)(3) and (1). In addition to the Respondent's locking the room immediately after employees used it as a location for a union meeting, the Respondent's proffered justification for its action—use of the room as a safe room for active shooter situations—was not credible. Accordingly, she would find that the Respondent here acted with discriminatory animus and that the Respondent was not able to show that it would have acted in the absence of protected conduct. See *KAG-West, LLC*, 362 NLRB 981, 982 (2015), petition for review dismissed 2017 WL 160821 (D.C. Cir. 2017); *Golden State Foods Corp.*, 340 NLRB 382, 385–386 (2003).

5. The Respondent has violated Section 8(a)(5) and (1) by failing to provide the Union with notice and an opportunity to bargain over its closure of the break room and the effects of that decision.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall cease and desist from engaging in and creating an impression of surveillance of employees' union or other protected concerted activities and prohibiting employees from speaking to union representatives off the property while wearing their uniforms. In addition, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally closing the training room for employee use, we shall order the Respondent to cease and desist from changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain over the closure decision and its effects and to rescind this unlawful change. The Respondent will also be required to post a remedial notice to employees in both English and Spanish.

ORDER

The National Labor Relations Board orders that the Respondent, Arakelian Enterprises, Inc. d/b/a Athens Services, Los Angeles, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Placing employees under surveillance and creating the impression of surveillance while they engage in union or other protected concerted activities.

(b) Promulgating an oral rule prohibiting employees from speaking to union representatives off the property while wearing their uniforms.

(c) Changing the terms and conditions of its unit employees without first notifying the Union and giving it an opportunity to bargain over the decision and its effects.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Labor, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on August 3, 2018.

(c) Post at its Pacoima facility in Los Angeles, California copies of the attached notice marked "Appendix" in both English and Spanish.[11] Copies of the English and Spanish notices, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

[11] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and former employees employed by the Respondent at that facility at any time since July 12, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 22, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT place you under surveillance or create the impression that you are under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT promulgate an oral rule prohibiting you from speaking to union representatives off the property while wearing your uniforms.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain over the decision and its effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Labor, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on August 3, 2018.

ARAKELIAN ENTERPRISES, INC. D/B/A ATHENS SERVICES

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-223801 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Amanda W. Laufer and *Christine Flack, Esqs.,* for the General Counsel.

Adam C. Abrahms and *Christina C. Rentz, Esqs. (Epstein, Becker, Green),* for the Respondent Company.

David L. Barber, Esq. (McCracken, Stemerman & Holsberry, LLP), for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In May 2014, the City of Los Angeles decided to change the way commercial businesses and multifamily buildings had their trash collected. At the time, trash collection from such customers was an open market in which multiple companies competed and operated in all areas of the city. The City changed that by passing an ordinance dividing the city into eleven zones, each to be serviced exclusively by a single waste collection company under a franchise contract with the City.

Athens Services (the respondent company here) was one of numerous companies that sought a franchise contract with the City to service one or more of the zones. Athens was a nonunion company that had serviced the area under the open-market system, and it wanted to continue doing so under the new franchise system as its Los Angeles customers provided a substantial portion of its revenue. There was at least one significant obstacle, however. The city ordinance required that, in order to obtain a franchise contract, a company had to enter into a "labor peace agreement" (LPA) with any union that represented or sought to represent the company's employees wherein the union agreed to refrain from any picketing, work stoppages, or any other economic interference with the company's performance of collection services.[1]

Accordingly, to ensure compliance with this condition precedent, in 2015 Athens negotiated and executed such an agreement with Teamsters Local 396, a union that represented employees at Athens' competitors, including Republic Services and Waste Management. As required by the ordinance, the LPA provided that the Union would not authorize, encourage, participate in, or sanction any strike or other similar workplace action for any reason. It also contained numerous additional provisions that were not required by the ordinance but which the Union insisted be included in the LPA. For example, it provided that, if and when Athens and the City executed a franchise contract, Athens would take a neutral approach to unionization of its employees; that upon 24-hours notice up to three union representatives would be allowed access to nonwork areas during nonwork times for up to 32 hours each month to communicate with the employees; that the Union would also be provided with the employees' names, addresses and phone numbers; and that Athens would recognize the Union at each facility if an arbitrator or other person selected by the parties determined that it had obtained authorization cards from a majority of the employees at that facility.[2]

The City awarded the eleven franchise zones the following year, in late 2016. Athens was awarded three of the zones (North Central, West LA, and Harbor). One or more of the other eight zones were awarded to several competitors, including Republic Services and Waste Management. The franchises subsequently went into effect in July 2017, and the zones were rolled out by February 2018.[3]

In the meantime, in February 2017 Local 396 began organizing at three of the Company's facilities in Pacoima, Torrance, and Sun Valley. It eventually obtained authorization cards from a majority of the drivers, helpers, mechanics, welders, and other yard and shop workers at each facility in late September 2017. Consistent with the LPA, the Company therefore recognized the Union as the bargaining representative of those employees at each of the three facilities.[4]

The parties began bargaining for an initial collective-bargaining agreement covering each of the facilities a few months later. Over the following year, from late November 2017 through late November 2018, their respective bargaining teams met numerous times. However, the Union was unable to reach a contract with the Company, primarily due to significant disagreements over union security (compulsory or so-called "fair share" union dues and fees) and the major economic items (wages and medical and retirement benefits).[5]

During this same period, a number of employees began soliciting signatures to remove the Union as the bargaining representative at each of the facilities. On July 6, 2018, formal petitions for a "decertification" secret-ballot election at each of the three facilities were filed with the NLRB Regional Office. All three petitions—31-RD-223309 (Pacoima), 31-RD-223318 (Torrance), and 31-RD-223335 (Sun Valley)—indicated that the requisite number of employees to obtain an election at the respective facilities (30 percent or more) no longer wished to be represented by the Union.[6]

The Union filed the initial unfair labor practice (ULP) charge against the Company in this proceeding a week later, on July 13. It also filed another on August 22. As later amended, the charges alleged that the Company had engaged in various coercive and discriminatory antiunion conduct in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act at all three facilities prior to the July 2018 decertification petitions. At the Union's request, the petitions were therefore held in abeyance pending resolution of the charges pursuant to the Agency's longstanding "blocking charge" policy. Thus, no decertification election was held at any of the three facilities.[7]

The Union also subsequently filed two more ULP charges against the Company in December 2018 and March 2019. The December 2018 charge alleged that the Company took certain additional retaliatory and unilateral actions against prounion employees in August 2018 in violation of both Section 8(a)(3) and Section 8(a)(5) of the Act. The March 2019 charge, as later amended, alleged that the Company also engaged in bad-faith

[1] See Ordinance No. 182986, Secs. 66.33.1 and 66.33.6. At the parties' request (Jt. Exh. 1 at 1 n. 1), judicial notice has been taken of the ordinance. A copy of both the ordinance and the corresponding municipal code sections can be found on the City's website at www.lacity.org.

[2] See Jt. Exhs. 1, 2; and Tr. 1548, 1994, 2232–2235. Section 66.33.6(c) of the city ordinance specifically stated that the ordinance did not require an employer to recognize a particular labor organization or enter into a collective-bargaining agreement establishing the substantive terms and conditions of employment; that it did not enact or express any generally applicable policy regarding labor/management relations or regulate those relations in any way; and that it did not provide a preference for any outcome in the determination of employee preference regarding union representation.

[3] Tr. 1075–1076, 1083–1086, 2115–2118, 2192–2193.

[4] Jt. Exhs. 1–7.

[5] See Jt. Exh. 1 and the more detailed discussion of the parties' contract negotiations infra.

[6] Jt. Exhs. 1, 52–54.

[7] See *U.S. Coal & Coke Co.*, 3 NLRB 398 (1937); and Sec. 11730 of the NLRB's Casehandling Manuals (Parts 1 and 2).

regressive bargaining in violation of Section 8(a)(5) by withdrawing previous contract proposals.

The Regional Director issued a consolidated complaint on all the foregoing 8(a)(1), (3), and (5) charges in May 2019. A hearing to address the complaint allegations and the Company's defenses was subsequently held over 10 days between August 6 and 19. The General Counsel and the Company thereafter filed posthearing briefs on September 23.[8]

As discussed below, a preponderance of the evidence establishes that the Company committed three of the alleged post-petition 8(a)(1) violations at the Pacoima facility (engaging in surveillance, creating the impression of surveillance, and promulgating an unlawful rule on July 12, 2018). The evidence also establishes that the Company violated 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain over the effects of an August 3, 2018 unilateral change at that facility. However, the evidence fails to establish that the Company committed any of the alleged pre-petition 8(a)(1) violations or any of the alleged 8(a)(3) violations at the three facilities. The evidence also fails to establish that the Company engaged in bad-faith regressive bargaining in violation of 8(a)(5) by withdrawing previous contract proposals in March 2019.[9]

I. ALLEGED 8(A)(1) AND 8(A)(3) VIOLATIONS

A. Alleged Violations at Pacoima Facility

The Pacoima facility (also called LA North or LANO) is the largest of the three facilities, with approximately 250 unit employees. The complaint alleges that the Company committed several 8(a)(3) and/or 8(a)(1) violations at that facility between March and August 2018.

1. Alleged March 2018 threat to discharge Csildo Garcia if he did not support the antiunion petition

Csildo Garcia has worked as a driver's helper at Athens since 2016. He testified that in March or April 2018 he was exiting the Pacoima facility to go home when he encountered Tomas Solis, the assistant general manager at the facility, just outside the door leading to the parking lot. Solis said he wanted Garcia to sign a piece of paper in his office. Garcia asked why, and Solis said it was so Garcia wouldn't "go into and join the Union." Garcia didn't know what Solis meant by this, but he asked Solis what would happen if he didn't sign the paper. Solis replied, "If you don't sign it, I'll take your neck," which Garcia understood to mean Solis would fire him. Garcia responded that he would wait to see if Solis did so and left without going to the office or signing the paper. (Tr. 38–41, 47, 50.)

Solis denied having any such encounter or conversation with Garcia or any other employee. He testified that he was trained to remain neutral as required by the LPA. (Tr. 1849–1850, 1858–1863, 1882–1885.) However, the General Counsel argues that Garcia is a more credible witness because he testified that he was not a member of the Union, knew little of it, and was "neither for it or against it" (Tr. 38), and because testifying against the Company was contrary to Garcia's pecuniary interest. Accordingly, the General Counsel contends that a preponderance of the evidence establishes that Solis threatened to discharge Garcia if he did not support the antiunion petition in violation of Section 8(a)(1) of the Act.

As indicated by the Company, however, there are several reasons to doubt Garcia's testimony. First, the record indicates that Garcia was not as uninformed and uninterested regarding the Union as he professed. Gilberto Lopez, an International Union organizer, testified that Garcia was "a regular" at the tent that the Union set up every Thursday on the public sidewalk outside the main gate to the facility throughout 2018, and that he always stopped to talk to the union representatives on his way home (Tr. 821). Further, Garcia admitted on cross-examination that the Union brought him to the hearing to testify (Tr. 45–46).

Second, Garcia's testimony about the incident contained troubling inconsistencies. For example, Garcia initially testified on direct examination that Solis did not respond when he said that he would wait to see if Solis took his neck (Tr. 40). However, Garcia subsequently testified on cross that Solis responded that anybody who didn't sign was going to have their neck taken (Tr. 48–49).

Third, Garcia admitted that he never mentioned the incident to the Union or anyone else. When asked on cross-examination to explain this, Garcia testified that it was because there were other people standing around, suggesting that he thought they would inform the Union. (Tr. 43, 48, 55.) However, Garcia had previously testified on direct that he didn't know if anyone else was present during the conversation because he was paying attention to Solis (Tr. 40–41). Moreover, given how frequently Garcia spoke to the union representatives after his shift, it seems unlikely he would not have mentioned such a remarkable incident to them if it had actually happened.[10]

Accordingly, the allegation will be dismissed.

2. Alleged May 2018 retaliatory discipline of Jose Maldonado for a Saturday no-call/no-show

Jose Maldonado has worked at Athens for about 3 years. At

[8] The Board's jurisdiction is uncontested and established by the record. Unless otherwise noted, the Company also does not dispute that the named individuals who allegedly committed the unfair labor practices were supervisors and/or acting as agents of the Company at all relevant times within the meaning of Section 2(11) and (13) of the Act.

[9] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Careful consideration has also been given to the way the testimony was adduced by counsel. For example, in general, less weight has been afforded testimony of nonadverse witnesses about disputed matters that was adduced by counsel on direct examination through leading questions, particularly where there was no demonstrated or apparent need to refresh the witnesses' memory or rephrase their prior testimony to develop a full and clear record. See FRE 611(c); and *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 (2019).

[10] See also fn. 25, infra (discrediting Garcia's testimony about a subsequent confrontation with a security guard in July).

the time of the relevant events, he was one of two tire mechanics at the Pacoima facility. The other tire mechanic was David Maldonado (no relation), who has worked at Athens for about 6 years. Jose was an early and open union supporter and was one of three employees at the facility who served on the union bargaining committee during the contract negotiations. David was not active in the Union. (Tr. 58–63, 107–109, 113–115, 246–248.)

Both Jose and David worked Monday through Friday every week. They both also initially worked every Saturday. However, in 2016, they asked the fleet manager, Mark Martorana, if they could rotate Saturdays as there was not enough weekend work for the both of them. Martorana agreed but said they had to make sure that one of them covered each Saturday. So after that they generally alternated Saturdays. The only time they both were required to work on a Saturday was following a holiday or if their shop supervisor asked them both to come in. (E. Exh. 1; Tr. 64, 113–116, 218–219, 247, 250–255, 316–323, 1742–1743, 1799.)

There was no written alternating Saturday schedule or other memorialization of this arrangement, however. Jose and David were both still listed on the formal Saturday schedule. They simply decided between themselves who would come in each Saturday. They would only inform their supervisor or foreman on Friday who was coming in if they changed their rotation or were specifically asked who was coming in. If for some unexpected reason the one who had agreed to work on Saturday could not do so, he was required to call in to notify the shop supervisor or foreman at least an hour before the shift so that arrangements could be made to have the other one, or if he was also unavailable on such short notice, some other shop employee, to cover the position. (Jt. Exh. 58; E. Exh. 19; Tr. 63–64, 117–118, 1567–1568, 1592–1593, 1735–1740, 1758–1759, 1800–1802.)

On Saturday May 19, 2018, however, neither Jose nor David showed up for work or called in to notify the shop supervisor or foreman. It was an unusual Saturday because the Company had scheduled a barbeque for the employees during the normal work schedule (9 .a.m— 3 p.m.). Martorana had therefore offered the shop employees as a group the option of working the Saturday shift immediately after the barbeque or on Sunday. He had told them to think about it and let him know.[11]

The shop employees were split but the majority preferred to work Saturday afternoon/ evening rather than Sunday. About 10–12 of them were discussing this a week or two before the barbeque when their supervisor at the time, Eric Zufall, walked by and remarked that they were going to have to work on Sunday.[12] This confused and upset them, as Martorana had previously said it was their option to decide as a group. So they asked Jose to speak to Martorana about it. Jose agreed and he, David, and about 10 other employees walked to Martorana's office. When they arrived both Martorana and the shop foreman, Richard Gonzalez, were there. Jose and David entered while the rest stood behind them at the door. Jose told Martorana and Gonzalez that the shop employees wanted to work on Saturday after the barbeque rather than on Sunday. Gonzales responded first, angrily saying that he would fire all of them. But Martorana rebuked Gonzales for saying that. He told Jose that it was no problem; that the shop employees could work on Saturday afternoon instead of Sunday if that was what they wanted. (Tr. 67–70, 130–131, 137–138, 260–265, 328, 331–338.)

When Saturday arrived, however, several of the shop employees did not show, for either the barbeque or the subsequent shift. Martorana checked with Zufall and/or Gonzalez to see if the no-shows had called in beforehand to explain their absence. Martorana was told that some had but four had not, including Jose and David. (Tr. 70–71, 126–127, 266–267, 339–340, 1753–1755.)

Martorana therefore decided to issue a "verbal warning" notice to all four employees for a no-call/no-show. He and Zufall met with David first. David apologized and said his mother was sick and asked him to stay home at the last minute. Martorana replied that he should have called in. Martorana and Zufall then met with Jose. Jose protested and told Martorana that it was his Saturday off. So Martorana pulled up the time and attendance records on his computer. The records showed that Jose had also not worked the previous two Saturdays, and Martorana told Jose that. Jose replied that he didn't think that was accurate, but that he might have made a mistake. Zufall at that point told Jose he should just sign the notice as it was only a verbal warning, the lowest level of discipline, and would come off his record within a year. So Jose signed it without further protest or comment.[13]

The complaint alleges that Jose was disciplined because of his protected concerted activity, i.e., because he had protested on behalf of the shop employees against working on Sunday, in violation of Section 8(a)(1) of the Act.[14] As primary support for this allegation, the General Counsel cites Jose's testimony about a conversation he had with Zufall immediately after the disciplinary meeting. Jose testified that he told Zufall that he didn't deserve the writeup; that he believed he was getting it because he had spoken up for the shop employees about not wanting to work on Sunday; and that Zufall replied, "Yeah, that's what you get for speaking up for the guys and them letting you down" (Tr. 74–78, 142–144). The General Counsel also argues that there is strong circumstantial evidence of animus and a retaliatory motive for the discipline.

However, as indicated by the Company, Jose was not a

[11] Jose testified that Martorana told them they would have to work on Sunday, and that he did not give them the option to work Saturday afternoon/evening instead (Tr. 66–67, 129). However, both David and Martorana testified otherwise; that employees were told they could decide as a group whether to work on Saturday or Sunday (Tr. 258–259, 326–327, 1744–1748).

[12] Zufall no longer works for Athens and could not be located or contacted to testify at the hearing (Tr. 1404–1405).

[13] GC Exhs. 2, 3; E. Exh. 15; Tr. 343–344, 1585–1587, 1594, 1754–1758. See also Tr. 1571 (time and attendance violations are removed from an employee's record after 6 months). At the hearing, Jose acknowledged that he was supposed to work the previous Saturday, May 12, but testified that he had called in sick to Gonzalez. However, he did not testify that he told Martorana or Zufall this at the disciplinary meeting. See Tr. 72–75, 134, 244.

[14] The General Counsel does not allege that the discipline violated Section 8(a)(3) of the Act, i.e., that the Company disciplined Jose Maldonado because he was a union supporter and member of the union bargaining committee.

particularly reliable witness. For example, as noted earlier (fn. 11), contrary to both David and Martorana, he testified that the latter had previously told the shop employees they had to work Sunday and did not give them the option to work Saturday afternoon/evening instead. This was a significant inconsistency as it obviously tended to support the complaint's theory that Martorana resented Jose's request on behalf of the employees to work Saturday instead of Sunday.

Further, as indicated above, it is undisputed that Martorana voiced no objection and readily agreed to Jose's request. There is also no evidence that Zufall was upset by the request. Indeed, he was not even present in Martorana's office at the time.[15] And while Gonzalez was present and upset for some reason, he did not have any actual supervisory authority and was not involved in the subsequent decision to discipline Jose, David, and the other two no-call/no-shows.[16]

As for the circumstances, they fail to support an inference of animus or a retaliatory motive for several reasons. First, as indicated above, while David and Jose did not usually both work on Saturdays, there was no formal alternating schedule. It was left to them to informally decide between themselves their Saturday schedule.

Second, there was no requirement or rule that only one of them could work on Saturdays. Indeed, as indicated above, they were both still listed on the formal Saturday schedule. They were simply allowed to alternate provided at least one of them worked every Saturday. Thus, Martorana—who was not their immediate supervisor and was at the facility only about one Saturday a month—would not necessarily have known or assumed that only one of them was supposed to work after the barbeque on May 19.[17]

Third, Jose admitted that neither he nor David notified Zufall or Gonzalez who was going to work on May 19 after the barbeque (Tr. 135, 244). And there is no evidence that either Zufall or Gonzalez told Martorana who they thought was going to work that day.

Fourth, although Jose asserted at the disciplinary meeting that it was not his turn to work that Saturday, the time and attendance records, which Martorana pulled up and reviewed, showed that he had also not worked the previous two Saturdays on May 5 and 12 as well. There is no evidence that either Jose or Zufall offered Martorana any explanation for this at the disciplinary meeting. See fn. 13, supra. Nor is there any evidence that David did so in his prior disciplinary meeting with Martorana and Zufall. Although David apologized and gave an excuse for not showing up for work on May 19, he did not discuss the schedule or what he and Jose had decided about working after the barbeque that day.

Fifth, although Martorana did not interview Jose or otherwise fully investigate why he did not show or call in before deciding to discipline him, there is no evidence that he interviewed David or the other two no-call/no-shows either. And the General Counsel does not allege or argue that Martorana summarily disciplined all the no-call/no-shows to camouflage a retaliatory motive for disciplining Jose.

Finally, while Martorana, like Jose, was not an entirely reliable witness (see fns. 17 and 41), this is insufficient by itself to satisfy the General Counsel's burden to establish that Jose's protected concerted activity was a motivating factor in the discipline. See *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).[18]

Accordingly, the allegation will be dismissed.

3. Alleged July 12, 2018 surveillance and impression of surveillance

As indicated above, the decertification petitions were filed a few months later, on July 6, 2018. The General Counsel alleges that, the following Thursday, July 12, Fleet Manager Martorana and a security guard, Kala Furquan (aka "Q") surveilled employees' union activities and/or created the impression that their union activities were under surveillance in violation of Section 8(a)(1) of the Act.

a. Alleged impression of surveillance by Martorana

As discussed above, Jose Maldonado was an open and active union supporter and member of the union bargaining committee. On July 12, shortly before his 6 p.m. meal break, he was helping a shop mechanic take down the flag by the main office when Fleet Manager Martorana walked by with foreman Gonzalez. Martorana commented that, if Maldonado gave the Union 30 minutes, he had to give the Company its 30 minutes. Maldonado assumed Martorana was referring to his upcoming meal break because it lasted 30 minutes and Thursday was the day each week when the Union typically put up its tent outside the main gate and spoke to the employees during their meal breaks. He thought Martorana was reminding him that, under the LPA, he could only talk to the Union during the 30-minute break and then had to go back to work. So he simply replied, "Yes, that's fine," and that was the end of the exchange. (Tr. 80–83, 155–156, 160–167.)[19]

The test for whether an employer's statement has created an

[15] See also Jose's testimony that Zufall subsequently told him during their post-discipline conversation not to worry about the verbal warning notice and that he would not sign it as the "supervisor" (Tr. 74, 76, 143). The "supervisor" signature on Jose's notice does, in fact, appear different than Zufall's signature as "supervisor" on the other three notices. However, the General Counsel does not contend that this anomaly supports the alleged violation.

[16] The General Counsel does not allege that Gonzalez was a supervisor within the meaning of Section 2(11) of the Act during the relevant period. See Tr. 1403.

[17] See Tr. 1729–1730, 1800–1802. Martorana also testified that he specifically asked that "all hands be on deck" for the barbeque unless an employee had a previously approved vacation or conflict, and that he had expected that everyone would work afterwards (Tr. 1749–1750). However, this testimony was not corroborated by any other witness or evidence. David and Jose testified that no one told them they both had to show up and work on May 19 (Tr. 221, 325). Further, Martorana did not subsequently discipline anyone for not attending the barbeque or for not working afterwards if they called in. Accordingly, no weight has been given to Martorana's testimony in this respect.

[18] Although *Electrolux* was an 8(a)(3) discrimination case, the same analysis applies in 8(a)(1) retaliation cases. See, e.g., *Tortillas Don Chavas,* 361 NLRB 101 (2014); and *Signature Flight Support*, 333 NLRB 1250 (2001).

[19] Maldonado's testimony about the exchange was not corroborated by the other mechanic, who was not called to testify. However, as the

impression of surveillance is whether, considering all the circumstances, the employees "would reasonably assume" from the statement that their protected union activities are being monitored. *Flexteel Industries*, 311 NLRB 257 (1993). See also *National Hot Rod Assoc*., 368 NLRB No. 26, slip op. at 2 (2019); and *Consolidated Communications of Texas Co*., 366 NLRB No. 172, slip op. at 1 fn. 1 (2018). The General Counsel contends that this test has been met here; that Martorana's statement would reasonably have been interpreted by Maldonado to mean that the Company was monitoring the time he spent talking to the Union and that it expected him to devote equal time to work.

However, such an interpretation would make no reasonable sense under the circumstances. As Maldonado himself testified, the timing of Martorana's statement indicated that it referred to his 30-minute meal break. By definition, break time is not work time. Further, Maldonado and the other shop employees were not even on the clock during their meal break; they were required to clock out before and clock back in after. Thus, they were clearly not taking time away from the Company by talking to the Union during their meal break.[20]

The Company further argues that Martorana's alleged statement made no sense whatsoever under the circumstances, and that it was therefore "clearly a joke" (Br. 87). The General Counsel, on the other hand, argues that "the vagueness and ambiguity of Martorana's statement should be construed against [the Company]" (Br. 38). However, regardless of whether the statement was clearly a joke or vague and ambiguous, as discussed above it would not reasonably have been construed by Maldonado in the manner asserted by the General Counsel.[21] Accordingly, the allegation will be dismissed.

b. Alleged surveillance and impression of surveillance by Furquan

Security Guard Furquan often posted in the yard, within view of the union tent, and was responsible for closing the gates at the end of the day. About 6 p.m., shortly after the exchange between Martorana and Maldonado, Shop Supervisor Zufall informed Martorana that there was a verbal altercation going on between Furquan and the union representatives and members at the tent; that they were cursing Furquan and calling him a racial epithet.

Martorana immediately called Assistant General Manager Solis, who had left at 5:30 and was driving home. Solis asked who the employees were and Martorana said he didn't know. Solis told Martorana that he should have Furquan take a photo of the employees who were in uniform so they could be identified. Martorana, however, misheard or misunderstood what Solis said because of the poor phone connection and Solis' dialect or accent. He thought Solis said that the employees should not be out on the sidewalk in their uniforms engaging with the Union, and to have Furquan take a photo of them if they did so. Martorana therefore told Zufall to tell Furquan to tell the union representatives that employees could no longer talk to them off the property while wearing their uniforms.[22]

Furquan walked out to the union tent shortly after and did so. He told the union representatives (no employees were there at the time) that if the employees wanted to talk to the union there, they "had to do it out of uniform." The union representatives protested, saying "that's bullshit" and "this is public property." Furquan replied, "I'm just telling you what [Solis] said. If you don't want to comply, this is what's going to happen. By the time I come back I'm gonna take pictures and let him know that you guys were not complying with what he said." The union representatives responded that Furquan should tell Solis "to go fuck himself," and that "we said, 'shut the fuck up.'" Furquan thereupon walked back to the gate.[23]

About 10 minutes later, Jose Maldonado finished his meal and came out to the tent to talk to the union representatives during the remainder of his break. Another employee, who had recently finished his shift, also came out to the tent. Furquan followed a few minutes later, cell phone in hand. He told Maldonado that he could not wear his uniform while talking to the Union. One

mechanic was a mere bystander employee, no adverse inference is warranted for failing to call him as a witness. See *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, slip op. at 4 (2019), and cases cited there. And the Company does not argue otherwise. Further, Martorana himself did not deny making the statement. Nor did Gonzalez, whom the Company did not call to testify (notwithstanding that, according to Maldonado, he had been promoted to supervisor prior to the hearing). Thus, the General Counsel could have reasonably concluded that there was no need to call the mechanic to testify. Ibid.

[20] See Tr. 183, 345–347, 1647–1648. Maldonado was likewise off the clock with the Company's full knowledge and permission when he attended the contract negotiations. See Tr. 60–61, 108–109, 147–148. See also 2038–2041 (Michael Bermudez, another employee on the union bargaining committee who worked at the Torrance facility, complained that it hurt him financially to be taken off the schedule to attend the bargaining sessions).

[21] The Company also argues that Maldonado's testimony indicates that he did not, in fact, interpret Martorana's statement as asserted by the General Counsel. However, as indicated above, the Board applies an objective test in evaluating such 8(a)(1) violations. Thus, while the full context has been considered, no reliance has been placed on Maldonado's subjective impression of the statement. See *Roemer Industries, Inc*., 367 NLRB No. 133, slip op. at 1 n. 3, and 6 (2019), and cases cited there. See also *Waste Stream Mgt., Inc*., 315 NLRB 1099 (1994).

[22] See Tr. 1763–1769, 1803–1807 (Martorana), and 1865–1868, 1886 (Solis). The General Counsel argues (Br. 42–43) that the foregoing testimony by Martorana and Solis should not be credited because the Company did not call Security Guard Furquan, who was clearly acting as its agent on July 12, to testify, and there is no other evidence that there had been a verbal altercation or that union representatives or employees had called him a racial epithet. However, it was not Furquan but Zufall who Martorana testified informed him about the verbal altercation and racial epithet. And, as previously noted, Zufall no longer worked for the Company at the time of the hearing and could not be located or contacted. Further, there is no evidence that Furquan had a practice of filing written security reports.

Moreover, there is no other apparent reason revealed by the record why Martorana and Furquan would have taken the unusual and unprecedented actions they subsequently did that day. Although the timing, within a week after the July 6 decertification petitions were filed, is certainly suspicious, there is no other credible evidence in the record to find or infer a connection between the events. See the discussion above discrediting Csildo Garcia's testimony regarding his alleged conversation with Solis, and below discrediting Michael Bermudez' alleged conversation with Torrance General Manager Michael Leidelmeyer.

[23] GC Exh. 14(b) (video); Tr. 814–816, 838–839.

of the union representatives objected, saying "[W]e are on public property, sir. And these guys are on their break or off work." Furquan ignored him and asked Maldonado if he was going to comply. However, one of the union representatives again interjected, saying Maldonado was "within his right." Furquan then held up his cell phone and took pictures or video of the entire group.[24]

A few minutes later, Csildo Garcia, who as previously discussed was a driver helper, also came out to the union tent after finishing his shift. Furquan followed shortly after with his cell phone and took a picture from the gate. The union representatives again protested that they were on public property, but Furquan replied, "I'm just doing my job man."[25]

About 15–20 minutes later, both Martorana and Furquan walked out to the tent. Martorana told the union representatives that the Company had informed the employees "that they can't be out here in uniform." He said he was therefore informing the Union that "that's our policy and that's our right." The union representatives again protested, saying, "we don't care about your policy," "this is public property," and the Company can't "control [an employee's] life" after work. Martorana responded, "We can control our property and our property is the company uniforms. Uniforms are our property." The union representatives continued to protest, but Martorana walked away, saying, "You've been informed, my employees are not to be out here in company uniforms."[26]

The next day, Martorana went to see the HR manager, Lupita Ramirez Guerrero, and informed her about the previous day's events. Ramirez told Martorana that he and Furquan should not have said that the employees could not talk to the Union off the property in their uniforms. She told Martorana he needed to "fix it." Martorana then contacted Solis and told him what Ramirez had said. Solis said Martorana must have misunderstood him and agreed with Ramirez that the situation needed to be "fixed." Martorana therefore told Zufall to tell Furquan not to tell anyone that employees could not talk to the Union off the property in their uniforms. (Tr. 1629–1632,1771–1774, 1832–1833, 1869, 1889, 1891.)

The General Counsel alleges that Furquan's conduct on July 12 (telling the union representatives that employees would not be allowed to talk to them at the tent while wearing their uniforms and that he would take pictures and show them to Solis if they did, and telling employees they could not talk to the union representatives at the tent while wearing their uniforms and photographing the employees when they refused to comply) created the impression that employees' union activities were under surveillance and surveilled employees' union activities in violation of Section 8(a)(1) of the Act.

The allegations are well supported. The Board has long held that photographing or videotaping employees engaged in protected union activity "has a reasonable tendency to interfere" with that activity, even if the union activity is engaged in openly. See *National Steel & Shipbuilding Co*., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), and cases cited there. Accordingly, photographing or videotaping employees engaged in such union activity is unlawful unless the employer has a reasonable basis to anticipate misconduct during that activity. Ibid. See also *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 26 (2019).

The Company argues that it had a reasonable basis to anticipate misconduct given Zufall's report to Martorana about the earlier verbal altercation between Furquan and the union representatives and members at the union tent. However, even assuming arguendo this is true, Furquan told the union representatives and employees that he was photographing them for an entirely different reason: because Solis had said employees were no longer allowed to talk to the union representatives at the tent while wearing their company uniforms. In these circumstances, employees would reasonably assume from Furquan's statements and actions that they were being monitored solely because they were speaking to the union representatives at the tent in their uniforms (which the Company does not dispute is protected union activity). And Furquan's statements and actions therefore would have had a reasonable tendency to interfere with the employees continuing to do so.[27]

The Company also argues that Furquan's July 12 statements and actions were not unlawful because they did not *actually* interfere with the employees' protected union activity, i.e., the employees did not take off their uniforms or stop talking to the union representatives at the tent.[28] However, as indicated above, the Board applies an objective test in evaluating such alleged 8(a)(1) violations. Thus, as previously noted (fn. 21), the employees' subjective reaction is not controlling. See also *Boeing Co*., 365 NLRB No. 154, slip op. at 2 n. 6, and 53 (2017) (the

[24] GC Exh. 14(c) (video); Tr. 84–86, 171–172, 817–820.

[25] GC Exh. 14(d) (video); Tr. 820–822, 829–837. Garcia testified that Furquan tried to physically make him remove the safety vest he was required to wear at all times while in the yard. However, like his testimony about the prior March or April conversation with Solis, his testimony contained troubling inconsistencies, including about where and when Furquan did this, who else was present, and whether he could understand what Furquan said to him (Furquan spoke English and Garcia's primary language is Spanish). Accordingly, his testimony in this respect has not been credited.

[26] GC Exh. 14(e) (video); Tr. 822–823.

[27] Accordingly, it is unnecessary to address the General Counsel's additional argument (Br. 44) that the Company did not communicate to the employees that it was photographing them because of the prior reported verbal altercation. Compare *Randell Warehouse of Arizona, Inc*., 347 NLRB 591, 598 (2006) (holding that photographing employees during a union election campaign constitutes objectionable conduct unless the reason is explained to the employees or is self-evident), and *Milum Textile Services Co*., 357 NLRB 2047 (2011) (finding that the employer created the impression of surveillance in violation of Section 8(a)(1) by placing a security camera in the employee lunchroom during the union's organizing campaign, as the employer never communicated to the employees that it did so because of prior vandalism there), with *Smithfield Foods, Inc*., 347 NLRB 1225, 1228 and n. 16 (2006) (finding no 8(a)(1) surveillance and impression of surveillance violations even though the employer did not communicate to employees that it had redirected a security camera to focus on their union organizing activities outside the plant because of a prior trespassing incident), rev. denied sub nom. *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1086–1087 (D.C. Cir. 2007).

[28] Although Garcia testified that he stopped talking to the union representatives when Furquan came out because he did not want to get into any problems (Tr. 53), as discussed above he was not a credible or reliable witness.

General Counsel does not have the burden to show that an employer's photographing or videotaping caused actual interference, restraint, or coercion).

Finally, the Company argues that no violation should be found because Furquan's July 12 statements and actions were a one-off "mistake based on a misunderstanding" and had no apparent lasting impact as uniformed employees continued talking to the union representatives at the tent the following Thursday and thereafter (Br. 110, 113).[29] However, the Company never repudiated those statements and actions by admitting its mistake and assuring employees that they had the right to talk to the union representatives at the tent in their uniforms. See *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); and *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978) (listing the requirements of an effective repudiation to avoid liability for a prior coercive statement). Martorana and Solis both admitted that they never told the employees that the July 12 statements and actions were a mistake based on a misunderstanding (Tr. 1813–1814, 1891). Ramirez likewise admitted that HR never posted anything about them or otherwise assured employees that they could talk to the union representatives at the tent during non-working time without taking off their uniforms (Tr. 1703–1704). And there is no evidence that Zufall or Furquan (neither of whom testified) did either. As indicated above, Martorana only told Zufall to tell Furquan not to tell employees the opposite. In these circumstances, the fact that some employees have continued to talk to the union representatives during their breaks or before or after their shifts is not proof that no other employees have been coerced not to do so. See *National Steel,* 324 NLRB at 502, and 156 F.3d at 1272.

Accordingly, by Furquan's statements and actions on July 12, the Company unlawfully created the impression of surveillance and surveilled employees as alleged.[30]

4. Alleged July 12, 2018 rule restricting uniformed employees from speaking to union representatives

The complaint also alleges, that, by Furquan's and Martorana's statements to employees on July 12, the Company promulgated a rule prohibiting employees from speaking to union representatives at the tent while wearing their uniforms in violation of Section 8(a)(1) of the Act. This allegation is well supported as well. First, the Company admitted at the hearing that it promulgated the rule (Tr. 305). Second, as indicated above, the Company does not dispute that uniformed employees have a protected right under the Act to speak to union representatives at the tent during their breaks and before and after work. Third, the rule on its face expressly prohibits employees from doing so. See *LA Specialty Produce Co*., 368 NLRB No. 93, slip op. at 3 n. 4 (2019) (a rule that expressly prohibits employees from engaging in protected activity is unlawful under longstanding precedent).[31] Fourth, as discussed above, the Company never repudiated the rule. Accordingly, the Company violated the Act as alleged.

5. Alleged August 2, 2018 surveillance of employees

A few weeks later, on Thursday, August 2, the Union again put up a tent outside the facility. Pursuant to a prior notice it had sent to the Company on July 30, the Union also went inside the yard to speak to employees during their breaks. Twice during the afternoon, at about 1 and 4 p.m., two union agents and a union member who worked for Republic Services walked into the yard through the main gate. However, both times, HR Manager Ramirez noticed the Republic employee (who was wearing a Republic uniform) and told the union agents that they could not bring him into the yard. (GC Exh. 23; Tr. 735, 738, 743, 783–784, 1632–1639, 1872.)

Adam Abrahms, the Company's attorney, emailed Paul More, the Union's attorney, about the incidents at about 4:30 p.m. Abrahms requested that the Union immediately cease bringing unauthorized competitor employees on the property and take all actions to ensure that union representatives cooperate with requests from management. .More responded by email at 4:45 and again at 5:28 p.m. In both emails, More stated that, although the Union did not concede to the Company's position, the Union would not bring individuals who work for other hauling companies onto the Company's property in the future. (E. Exhs. 6, 8; Tr. 1118, 1124–1127, 2253 –2255.)

Nevertheless, about an hour later, around 6:30 p.m., two union organizers, David Acosta and Fernando Hernandez, again entered the yard with the Republic driver, this time to speak to the shop mechanics who took a 30-minute meal break at that time.[32] The three of them had initially planned to enter through the main gate as before. However, at about 6:20 p.m., Security Guard Furquan closed and locked that gate at Fleet Manager

[29] Martorana and Solis testified that they continued to see uniformed employees at the union tent after July 12 (Tr. 1774, 1891). Maldonado also testified that he and other uniformed employees have continued to talk to the union representatives at the tent when they are off the clock (Tr. 157–159).

[30] Although the Company's answer generally denies that Furquan was its agent, the Company's posthearing brief does not dispute that he was acting as its agent on July 12. And the evidence clearly establishes that he was doing so.

[31] The complaint and the General Counsel's posthearing brief do not rely on the "expressly prohibits" theory, but instead allege and argue that the rule is unlawful because it was promulgated in response to protected union and concerted activity and to discourage employees from engaging in such activity. However, the theories are closely related and, as indicated above, the relevant facts supporting the "expressly prohibits" theory are undisputed. See, e.g., *IBEW Local 58 (Paramount Industries, Inc.),* 365 NLRB No. 30, slip op. at 4 n. 17 (2017) (holding that it was proper to find an 8(b)(1)(A) violation on an additional theory that the General Counsel had not clearly pursued, as "the conduct was alleged in the complaint," "all of the underlying facts [were] undisputed," "the law [was] well established," and "no due process concerns [were] implicated"), rev. denied 888 F.3d 1313 (D.C. Cir. 2018). See also *Space Needle, LLC*, 362 NLRB 35, 38 (2015), enfd. 692 Fed.Appx. 462 (9th Cir. 2017); *Intertape Polymer Corp*., 360 NLRB 957, 958 n. 8 (2014), enfd.in relevant part 801 F.3d 224, 232–233 (4th Cir. 2015); and *Parexel Int'l, LLC*, 356 NLRB 516 (2011). Further, the General Counsel never affirmatively and unequivocally stated or conceded during the litigation that the Company's rule does not explicitly prohibit protected union activity. Accordingly, it is unnecessary to address the General Counsel's alternative theory.

[32] The shop employees took their evening meal breaks at different times. Some, like Jose and David Maldonado, took the meal break at 6 p.m., and a few took it at 7 p.m. However, most took it at 6:30 p.m. See E. Exh. 18 (the August 2 meal break schedule).

Martorana's direction because dispatch had reported that the last truck had returned for the day. They protested to Furquan, saying they had planned to enter the yard. But Furquan just shrugged and refused to let them in. So they walked around and entered through a side gate instead, which was still open. (E. Exh. 22; Tr. 746, 782–783, 792–793, 1774–1775.)[33]

Furquan immediately notified Martorana, reporting that he believed they were hiding in between the parked trucks. Martorana told Furquan to find and tell them that they were not allowed in the yard and were trespassing. Furquan located them shortly after and did so. However, Acosta responded that they had the right to be there and they began walking toward the building. Furquan followed, repeating that they had to leave. (E. Exh. 22; Tr. 747–748, 1775–1776.)

At this point, as they approached the building, Martorana himself confronted them. Martorana said he was told to get them off the property, and if they didn't leave he would call the police. However, Acosta replied that General Manager Solis already knew they were there,[34] and they continued walking up the stairs and into the building's open common break area. Martorana, who was now trailing slightly behind them, continued to protest, saying the mechanics were no longer on their meal break and could not talk to them. (E. Exh. 23 (video); Tr. 748–749, 783–785, 794–796, 1776–1778, 1814–1817.)[35]

However, they continued walking and proceeded toward an adjacent training room where they had met with the shop employees in the past during their meal breaks. Martorana again objected, stating that they were only allowed in the common area. Nevertheless, they opened the door and entered the room, where several shop employees were sitting and eating. Martorana followed them in and asked the employees what time they had clocked out for their meal break. Several of the employees said 6:30. Hernandez then also asked them if they were on their meal break, and they said yes or nodded. (E. Exh. 23; Tr. 280, 730–731, 779–780, 786–787, 796–797, 1780–1781, 1817.)[36]

It was now about 6:35 p.m. Martorana at that point asked Solis, who he had reached on his cell phone, what he wanted to do. However, Acosta interrupted, warned Martorana that Solis wouldn't want to get involved, and tried to speak directly to Solis in Spanish through Martorana's phone. So Martorana turned and walked out of the room to continue the phone conversation in private. Acosta called out after him, saying "be ready" and "go fuck yourself" as the door closed behind him.

Solis told Martorana not to call the police but to wait and let him see what he could do. Several minutes later, at 6:47 p.m., Martorana received a call back from Michael Pompay, the Company's HR Vice President/General Counsel. Pompay told him to let the union representatives stay another 13 minutes, until 7 p.m., and then tell them they had to leave or the police would be called.

In the meantime, Furquan entered the training room and used his cell phone to photograph or videotape Acosta, Hernandez, and the Republic employee with the shop employees. Furquan then left but was followed by Shop Foreman Gonzalez. Gonzalez, who had never eaten with the employees before in the training room, walked in with a pizza, sat down on the other side of the room, and began eating it. He continued doing so until the employees and union representatives left about 10 minutes later, shortly before 7 p.m. (E. Exhs. 22, 23; GC Exh. 14(a); Tr. 91–92, 193–195, 232–234, 279, 751–754, 787–790, 798–799, 1782, 1817.)

The General Counsel alleges that, by Furquan's and Gonzalez' foregoing conduct in the training room, the Company surveilled the employees' union activities in violation of Section 8(a)(1) of the Act. However, it is not unlawful for an employer to engage in such conduct where it has a reasonable concern about trespassing. See, e.g., *Smithfield Foods, Inc*., 347 NLRB 1225, 1228 (2006) (employer did not unlawfully surveil employees or give the impression of surveillance by redirecting a security camera to record union handbilling, as the employer had a reasonable concern about trespassing), rev. denied sub nom. *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1086–1087 (D.C. Cir. 2007).

The record indicates that the Company had such a reasonable concern here. The Union had no absolute right of access to the Company's property under the Act. See *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985) (the right of employees to proper representation by their collective-bargaining representative must be balanced against the employer's right to control its property), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986). And the General Counsel has not alleged that the Union had a right of access under the Act and that the Company violated it on August 2. Compare, for example, *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 20 (2016) (employer violated 8(a)(1) by denying representatives of the recognized union access to the cafeteria to meet with unit

[33] See also E. Exh. 17 (showing that all of the truck drivers clocked out by 6:30 p.m. on August 2, except for one who did not clock out until an hour later).

[34] Solis had spoken to them in the yard after Ramirez told them to leave the second time that afternoon. However, unlike Ramirez, Solis did not tell them to leave; he just told the Republic driver to put on a safety vest. (Tr. 740–743, 766–767, 1872–1876, 1893.)

[35] Martorana testified that "they" physically "pushed through" and "bumped" him at this point (Tr. 1776; see also E. Exh. 22). However, the video (E. Exh. 23) indicates that Martorana was already slightly behind them when they reached the bottom of the stairs and that Martorana bumped into Acosta's back shoulder as he was looking down at and typing on his cell phone.

[36] In fact, as Martorana later discovered, some of the shop employees who were in the training room, including Jose and David Maldonado, had taken their meal break earlier. See E. Exh. 18 (Jose clocked out for his break at 5:58 and clocked back in for work at 6:28; and David clocked out 6:03 and clocked back in at 6:33). See also E. Exh. 22. Apparently for this reason, Jose and David Maldonado testified at the hearing that the union representatives and Martorana came into the training room earlier, at 6:05 or 6:10 p.m. rather than around 6:30 p.m. (Tr. 89–90, 275–279). However, this testimony is contrary to the weight of the evidence, including the testimony of union organizers Acosta and Hernandez. Accordingly, it has not been credited. Nevertheless, I credit Jose and David's testimony that they had been allowed in the past to take a full hour for their meal break if they did not take their two paid 15-minute breaks during the day (Tr. 202–203, 372–373). Although HR Manager Ramirez testified otherwise (Tr. 1648), neither Martorana nor Solis did so. Further, Martorana admitted that he did not discipline any of the employees for not immediately returning to work after clocking back in that day (Tr. 1786).

employees), enfd. in relevant part 860 F.3d 639, 646–647 (8th Cir. 2017).

Further, although the LPA affords the Union a limited right of access upon 24-hour notice, the Union had notified the Company that it would be accessing the property that day at 1 p.m., not 6:30 p.m. And, again, the General Counsel has not alleged that the Union had a right of access under the LPA and that the Company violated it or otherwise failed to comply with its bargaining obligations under Section 8(a)(5) of the Act on August 2. Compare, for example, *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 34 (2019) (employer violated 8(a)(5) by no longer permitting the union to utilize meeting rooms for meetings); and *Linwood Care Center*, 367 NLRB No. 14, slip op. at 13 (2018) (employer violated Section 8(a)(5) by unilaterally altering the parties' access agreement by, among other things, restricting access to one representative at a time), and cases cited there.

Moreover, the LPA (par. 7) specifically requires the Union to "follow all Employer safety and security protocols while on [the] property."[37] And both Furquan and Martorana had repeatedly told the Union that the yard was closed, that they were trespassing, and that they were required to leave the premises. HR Manager Ramirez had also repeatedly told them earlier that day not to bring the Republic driver into the yard. They nevertheless did so, even though Union Attorney More had assured Company Attorney Abrahms they would not.[38]

Accordingly, the allegations will be dismissed.[39]

6. Alleged August 3, 2018 discriminatory change barring employees from using the training room during meal breaks

As indicated above, there is an open common area in the building, with three round tables and chairs, where employees can eat during their meal breaks. However, shop employees for years regularly took their evening meal breaks in the adjacent room where the Company conducts training and safety meetings. The door to the room did not have a sign restricting it to such meetings and the Company never used it after 6 p.m., when the shop employees typically began taking their evening meal (or "lunch") breaks. Further, they preferred the training room to the open common area because returning drivers often used the tables there to complete their paperwork and would talk to them about problems with their trucks. The training room had both more table space and more privacy. It also had a sink and a time clock. (E. Exhs. 2, 3, 4, 17; Tr. 88–89, 182, 204–205, 208, 225–227, 237–238, 270–272, 283–285, 329, 368, 375, 1706–1707.)[40]

Zufall, the shop supervisor, was aware that shop employees took meal breaks in the training room. So were Fleet Manager Martorana, and HR Manager Ramirez. None of them, however, told the employees they could not do so. Nor did they lock the door to the room or otherwise attempt to prevent them from taking meal breaks there. Indeed, Zufall moved a microwave into the room for them. (E. Exh. 23; Tr. 88, 94–95, 207, 224, 375, 1789, 1791.)[41]

However, this all changed on Friday, August 3, the day after the incident in the training room with the union representatives discussed above. The Company locked the door to the room and informed the shop employees that they could no longer take their meal breaks there; that the room was going to be used exclusively for training and safety meetings and as a safe room in active shooter situations. The shop employees therefore began taking their evening meal breaks together outside under a tree. (Tr.

[37] The LPA also provides (par. 14) that all disputes under the LPA will be submitted to expedited and binding arbitration.

[38] There is no direct evidence that the presence of the Republic driver was a reason for locking the gate at 6:20 p.m. or for Martorana's subsequent request that he and the union organizers leave. However, as indicated above, when Martorana initially confronted them approaching the building, he stated that he had been told to get them off the property. Thus, he had apparently already spoken to someone in management about their presence at that point. Further, the General Counsel concedes (Br. 49 n. 26) that Ramirez' prior objections to the presence of the Republic driver are an "important surrounding circumstance" in evaluating the Company's subsequent conduct.

[39] Given the above findings, it is unnecessary to address the Company's additional arguments that the General Counsel failed to establish that Gonzalez and Furquan were acting as agents of the Company within the meaning of Section 2(13) of the Act on August 2.

[40] HR Manager Ramirez testified that most drivers do their paperwork in their truck or at the counters in the dispatch area; that they rarely use the tables to do their paperwork; and that she has never seen more than one or two drivers do so after 5:45 p.m. (Tr. 1642). Driver Ernesto Calvillo, one of the decertification petitioners who was called to testify by the Company, provided similar testimony (Tr. 1454–1460). However, the record indicates that numerous drivers return after 5:45 p.m. See E. Exh.17 (showing eight drivers who did not clock out until after 6 p.m. on August 2, 2018). It also indicates that numerous shop employees take their meal breaks during this time. See E. Exh. 18 (showing that four shop employees took their evening meal break at about 6 p.m. and 11 shop employees did so at about 6:30 p.m. on August 2). (E. Exh. 18). Further, the record indicates that Ramirez usually left work between 5:45 and 6 p.m. (Tr. 235–236, 366), and that Calvillo was also usually gone by 6 p.m. (Tr. 1454–1460; E. Exh. 17).

[41] Both Ramirez and Martorana admitted that the door had a lock on it and Martorana admitted that he had a key to it (Tr. 1656, 1792–1793). Ramirez also admitted that she did not tell the employees not to take meal breaks in the training room, testifying that she instead told Martorana to (Tr. 1709–1711, 1720). As for Martorana, he confirmed that Ramirez told him to tell the employees not to take meal breaks in the room and testified that he did so. Indeed, he testified that he told them multiple times because the housecleaner complained that they left food and trash there. (Tr. 1793–1796, 1827–1828). However, the only documentary evidence presented to support this testimony was a sign-in sheet for a March 2, 2018 safety meeting he conducted which contained a vague handwritten notation that one of the topics was the "meal period lunch area" (E. Exh. 24). Further, Martorana's actions on August 2 and thereafter belie that he had previously directed the employees not to eat in the room. As shown by the video evidence (E. Exh. 23), he said nothing whatsoever to the employees about being in the room on their meal break when he encountered them there. His only expressed concern was what time they had clocked out for their break. See also Tr. 374, 1822. He also said nothing about the employees having insubordinately taken their meal break there in the detailed 2-page typed report about the incident that he submitted to Solis a few days later (E. Exh. 22). Nor is there any evidence that he ever disciplined any of the employees afterwards for insubordinately doing so. Accordingly, I credit Jose and David Maldonado's testimony that no one in management ever told them prior to August 3 that they could not take their meal breaks there (Tr. 95, 273). And I therefore reject the Company's contention that the employees had never been allowed to eat in the training room and that no change therefore occurred on August 3.

92–97, 238, 280–285.)

The General Counsel alleges that this change was discriminatorily motivated by the Company's animus against protected union activities in violation of Section 8(a)(3) of the Act. In support, the General Counsel cites the timing of the change, the day after the Company surveilled the union activities in the training room, as well as the Company's previous unlawful surveillance in July.

As discussed above, however, the surveillance of the union activities on August 2 was not unlawful as the Company reasonably believed that the union representatives were trespassing and otherwise refusing to comply with security and management directives. And while the previous surveillance in July violated Section 8(a)(1) of the Act under the Board's objective test, the evidence indicates that it was based, not on union animus, but on Zufall's report of a verbal altercation between the union representatives and Furquan, and on Martorana's misunderstanding of Solis' instructions about how to address it.

Further, the record plainly indicates that the Company's objection was not to the employees meeting with union representatives during their meal breaks, but to them doing so in what the Company perceived to be a working area rather than a nonworking area as required by the LPA. Contrary to the General Counsel's brief, there is no record evidence that any supervisor or manager knew prior to August 2 that union representatives were meeting with employees in the training room during their Thursday evening meal breaks or had authorized them to do so. On the contrary, Martorana's reaction on August 2 when the union representatives approached the training room clearly indicated both (1) that he was not aware union representatives had been meeting with employees there during their Thursday evening meal breaks; and (2) that he did not believe it was an appropriate nonwork area under the LPA for them to do so. See also Attorney Abrahms' subsequent August 7 letter to Attorney More (E. Exh. 9), which referenced the August 2 events and advised the Union that it must comply with all the LPA's parameters, including that access must be limited to non-working areas unless the parties mutually agree otherwise.[42]

Finally, under the circumstances, locking the training room was not a grossly disproportionate response to the union representatives' perceived misconduct and violation of the LPA.[43] As indicated above, the union representatives had repeatedly demonstrated by both their actions and words on August 2 that they were unlikely to stop meeting with the shop employees there in the future simply because company managers or supervisors said they were not allowed to. Thus, the Company could reasonably conclude that it was necessary to lock the training room to preserve and enforce its position.[44]

In sum, contrary to the General Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities or that those activities were a motivating factor in locking the training room and thereby preventing employees from continuing to take meal breaks there.[45] Accordingly, the 8(a)(3) allegation will be dismissed.[46]

B. Alleged Violations at Torrance Facility

The Torrance facility (also called LA South or LASO) is the next largest facility, with approximately 150 unit employees. The complaint alleges that the Company committed two 8(a)(3) and/or 8(a)(1) violations at the facility in March and June 2018.

1. Alleged March 21, 2018 interrogation and solicitation of Michael Bermudez to support the antiunion petition

Michael Bermudez worked as a sanitation truck driver for Athens from January 2016 until he was terminated on June 11, 2018. He was an active union supporter and was one of three employees at the facility who served on the union bargaining committee. (Tr. 492–496.)

In March 2018, Bermudez was at the HR office after his shift when Operations Manager Matt Martinez asked him to come into General Manager Michael Leidelmeyer's office. Bermudez did so and found that his field supervisor, Kam Naeole, was also there. Martinez then closed the door and Leidelmeyer told Bermudez that another supervisor, Carlos Altamiano, had seen him on his cell phone while operating his truck. Leidelmeyer asked Bermudez if he loved his job, and Bermudez said he did. Leidelmeyer then asked Bermudez directly if he was on his phone, if he was texting or calling, and Bermudez said he was not. He told Leidelmeyer that he was just changing the Pandora music station at the time. Leidelmeyer replied that he could pull Bermudez' phone records, and Bermudez said, "Go ahead." At that point, Leidelmeyer called Altamiano on a two-way radio and asked if he was 100 percent sure that he had seen Bermudez on his phone. Altamiano said that he was. Leidelmeyer asked

[42] The General Counsel has not alleged or argued that locking the training room and preventing the shop employees from continuing to take their evening meal breaks and meet with union representatives there was "inherently destructive" of their statutory rights under the analysis in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Company therefore was not required to show that its position regarding the training room—that it was a working area under the LPA—was reasonable and arguably correct. See generally *Hawaiian Telcom, Inc*., 365 NLRB No. 36, slip op. at 2–3, 5 (2017), and cases cited there (discussing the parties' respective burdens under the *Great Dane* analytical framework). See also *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44 (2003) (declining to address an "inherently destructive" theory that had not been alleged or fully litigated).

[43] Cf. *Spurlino Materials*, 353 NLRB 1198, 1221 (2009) (finding that the employer's discipline of an employee was discriminatorily motivated in part because it was out of proportion to the gravity of the employee's relatively minor offense), reaffd. 355 NLRB 409 (2010), enfd. 645 F.3d 870, 882 (7th Cir. 2011).

[44] As previously noted, the Company primarily argues (contrary to a preponderance of the credible evidence) that the employees have never been allowed to use the training room for meal breaks. However, it alternatively argues that locking the room was not discriminatory because the Union engaged in unprotected trespassing on August 2 (Br. at 128 n. 35). And as found above, a preponderance of the evidence indicates that the Union's trespassory conduct on August 2 (including the Union's refusal to remain in the common break area outside the training room) was in fact the reason for locking the training room on August 3.

[45] *Indiana Hospital*, 315 NLRB 647 (1994), the primary case cited by the General Counsel, is therefore distinguishable.

[46] However, as discussed infra, the Company violated Section 8(a)(5) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects that the decision to lock the training room door had on the employees' terms and conditions of employment.

Bermudez (who had heard what Altamiano said) for his response, and he again denied it. (Tr. 500–504, 1908–1912, 1917, 1948, 1951–1954, 1977–1978, 2000–2005, 2069–2076.)

According to Bermudez, Leidelmeyer then said he wanted to fire him but Martinez and Naeole did not. Leidelmeyer said he would therefore give Bermudez a final written warning and put him on 6-months probation instead.

Bermudez testified that Leidelmeyer then changed the subject and asked him what he thought about the Union. Bermudez responded that it was his first time being involved with a union and it was a learning process. Leidelmeyer replied that Bermudez was a respectable young man; that he had great influence in the yard; that the workers respected him; and that he was going to need his help. Leidelmeyer said there was going to be a petition to decertify the Union and he needed Bermudez to "spread the gospel" about how well Athens had treated him.

Bermudez said that he couldn't do that; that he couldn't turn his back on the employees, and no one would want to work with him if he did. Naeole responded that Bermudez would still have his brother Ignacio there (who worked as a helper at the facility). And Leidelmeyer said Bermudez would also have a couple of "allies," naming several employees who did not support the Union. However, Bermudez said he just couldn't do it. He also complained saying, "This is not cool, how am I going to be able to work now? I'm going to feel paranoid, like I always have to watch my back." Leidelmeyer responded, "Whether you help me or not, this 6-month probationary thing is still on you." And the meeting then ended. (Tr. 505–513, 574–575.)

Based on Bermudez' foregoing testimony, the General Counsel alleges that the Company interrogated him regarding his union sympathies and solicited his help to decertify the Union in violation of Section 8(a)(1) of the Act. However, there are several problems with Bermudez' testimony. First, Leidelmeyer, Martinez, and Naeole all disputed it. All three testified that, after Bermudez again denied the accusation after the two-way radio call to Altamiano, Leidelmeyer simply told Bermudez that he would review the matter further and get back to him. Given that Bermudez already had a final written warning for a prior safety violation, Leidelmeyer also cautioned him to be careful because another safety violation would warrant termination. Bermudez then left. (Tr. 1914–1917, 2005–2011, 2075–2079.)

Second, the Company's progressive disciplinary system does not even include a 6-month probationary period. The only progressive disciplinary steps are verbal warning, written warning, suspension, final written warning, and termination. Nor are safety violations (such as using a cell phone while operating a truck) expunged from an employee's record after 6 months. Rather, both safety and behavioral/performance violations remain on an employee's disciplinary record for 2 years. Only time/attendance violations are removed after 6 months. (Jt. Exhs. 57, 58; Tr. 1568–1575, 1580, 2078–2079.)

Third, the record confirms that Bermudez had been given a final written warning just a month earlier, in February 2018, for safety violations (two preventable accidents since December 2016). Thus, under the Company's progressive disciplinary system, he would not have been given the same or lesser discipline for another safety violation. The only options were termination or no discipline at all. (GC Exh. 11; Tr. 1572–1575, 1688–1689, 1716–1717, 1722–1724, 2011.)[47]

Fourth, it is undisputed that Bermudez was not, in fact, issued any discipline for the cell phone incident. Leidelmeyer, Martinez, and Naeole all testified that it was ultimately decided not to issue any discipline to Bermudez because it was a "he said, she said" situation without any corroborating evidence. And Naeole told Bermudez so the next working day. (Tr. 512–513, 575, 1917–1921, 1953–1954, 1976, 2009, 2011, 2076.)

Fifth, Bermudez admitted that, other than his brother (whom the General Counsel did not call to testify), he did not tell any other drivers about Leidelmeyer's request for help in decertifying the Union. He also admitted that he didn't tell the Union. When asked why, Bermudez testified that he was afraid the Company would retaliate against him. However, he admitted that he told the Union about another incident involving the decertification petition in May; specifically, that an employee carrying a binder with the names and photos of employees told him that an individual in the personnel office had given him the binder and asked him to solicit the employees' signatures on the petition. Bermudez even submitted a written statement about it to the Union's president, Jay Phillips, and agreed to have Phillips read the statement aloud to Company Executive Vice President Cesar Torres and HR Vice President Pompay at the May 30 bargaining session.[48] Moreover, the employee Bermudez identified was one of the "allies" he testified Leidelmeyer named during the March conversation about the decertification petition. Thus, if that conversation with Leidelmeyer had actually occurred, it would have been natural for Bermudez to mention it to the Union

[47] The General Counsel argues otherwise, citing the following language of the Company's progressive discipline policy:

> The Company has a system of progressive discipline that may include verbal warnings, written warnings, and suspension. The system is not formal, and the Company may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances, up to, and including, immediate separation of employment."

(Jt. Exh. 57, at 2.). However, the record indicates that this language was intended simply to clarify that the Company retained the option to bypass the initial steps depending on the nature and severity of the violation. For example, as discussed infra, the Company issued Bermudez a final written warning in late April 2017 for a behavioral/performance violation (making "an indirect comment" that included "the 'N' word"), even though he had not received any prior discipline for a behavioral/performance violation in the previous 2 years. See GC Exh. 10. In contrast, there is no evidence that the Company has ever issued the same or lesser discipline to an employee for another violation in the same disciplinary category or track. Although the record includes a subsequent June 5 final written warning that was prepared for issuance to Bermudez for another behavioral/performance violation (insubordinately refusing to switch trucks with another driver) on June 2, it appears to be just a draft (as discussed infra Bermudez was actually terminated on June 11 for the incident), it is unclear who prepared and signed it, and the General Counsel never pursued the matter after Torres testified that he didn't recognize the signature. See E. Exh. 28, and Tr. 2146–2148.

[48] Tr. 515–517, 580, 583–585, 2123, 2241, 2437. See also Jt. Exh. 62 (listing the individuals present at each of the bargaining sessions, including the May 30 session).

in connection with the May incident.[49]

Accordingly, the allegations will be dismissed.[50]

2. Alleged June 11, 2018 discriminatory discharge of Bermudez for insubordination

As indicated above, Bermudez was subsequently terminated on June 11. The General Counsel alleges that the termination violated Section 8(a)(3) of the Act because it was motivated at least in part by Bermudez' protected union activities. However, as discussed below, the evidence fails to prove this allegation as well.

The relevant events leading to Bermudez' June 11 termination occurred 9 days earlier, on Saturday June 2. It was not a typical trash day for two reasons. First, it was the week following the Memorial Day holiday on Monday May 28. Second, because of the Monday holiday, the usual Friday routes had been moved to Saturday. Thus, due to both the holiday and the extra day, it was likely that there would be more trash than usual. (Tr. 1929–1930.)

At about 6:30 a.m., Field Supervisor Naeole gave Bermudez and the other drivers their assignments and maps for the day. It was Naeole's job to determine and revise the routes as necessary to ensure that each driver could pick up as much trash as possible without going over the truck's weight limit (12 tons). And he had frequently tried to revise Bermudez' Redondo Beach route to reduce overweights without much success. In fact, Naeole had revised the route the previous Friday for this reason. However, Bermudez was still overweight at the end of the day. So, Naeole gave Bermudez the same route on June 2 that he had before the revision. He told Bermudez that he would call him later to see how he was doing.[51] Bermudez then left with his helper, Oscar Mejia, to do the route.

Several hours later, at about 11 am, Bermudez was about 90 percent through his route when he noticed that the truck was getting full and probably would not be able to finish it. The truck was still packing the trash, but Bermudez anticipated that it would not continue doing so through the remainder of the route. Consistent with the usual practice, he called Naeole on the two-way radio to let him know. Although the line was busy, Naeole called him back a few minutes later. Bermudez told Naeole that he was on Huntington and Mackay approaching Phelan and that the truck was still packing but probably wouldn't finish the route. Naeole replied that he would send out Jacinto Pimental, another driver with a Redondo Beach route, to meet him at the corner of Huntington and Phelan and do a "truck switch," i.e., Pimental would take Bermudez' truck to the dump and Bermudez would

[49] This is not to say the two incidents were indistinguishable. It was Bermudez' word against the word of three managers and supervisors (Leidelmeyer, Martinez, and Naeole) regarding the March meeting. However, this difference would only explain why Bermudez did not formally allege a violation of the Act and/or the LPA at the time, when he was still employed by the Company. It does not adequately explain why he would not have told the Union about it at the time. And Bermudez did not offer it as the explanation.

[50] The Company also argues that Bermudez' testimony should be discredited because it is "inherently improbable" that Leidelmeyer would have asked him what he thought of the Union or to help decertify the Union given that he was a well-known union supporter and a member of the union bargaining committee (Br. 148). However, Martinez testified that Bermudez had twice previously complained to him that he was just an observer at the bargaining sessions, had no input in them, and they were hurting him financially because he was missing work to attend them (Tr. 2038–2041). Thus, Martinez and Leidelmeyer reasonably could have concluded that Bermudez' previous enthusiasm for the Union was waning, particularly since there had been little or no discussion or progress regarding economic terms (e.g., wages, healthcare, and retirement benefits) during the previous 4 months of bargaining. In any event, it is unnecessary to rely on the inherent improbability of Bermudez' account given the other substantial problems with that account discussed above.

[51] Naeole testified to the contrary; that he told Bermudez to call him when his truck was "getting heavy" and he would send him some help (Tr. 1934). And there are some reasons to credit Naeole's testimony on the point. It is undisputed that Bermudez' truck was frequently overweight; that Naeole had repeatedly tried to adjust his route with little success; and that more than the usual amount of trash was expected that day (Tr. 714, 1926–1930, 1959.) Further, Naeole's testimony was consistent in this respect with the written statement he submitted to Martinez on June 4, 2018 about the events (GC Exh. 5). Moreover, although Bermudez denied that Naeole said to call in when his truck was getting overweight (Tr. 522, 540, 639), as discussed above regarding his prior meeting with Leidelmeyer, there are substantial reasons to question his credibility or reliability as a witness.

However, the record as a whole indicates that it would have been highly unusual for Naeole to make such a request of Bermudez, even on a post-holiday trash day. As indicated above, it was Naeole's responsibility to ensure that the trucks did not get overweight by adjusting the routes. (See also Tr. 1898, 2015–2017.) The drivers themselves were not required to closely monitor the weight of the truck or disciplined for failing to do so. On the contrary, they were expected and encouraged to keep picking up trash until the truck could not physically hold any more, i.e., until the truck would no longer "pack" (compress the trash to make room for more trash). (Tr. 523–526, 557–559, 630–633, 713–718, 1960). Although Operations Manager Martinez testified otherwise—that the drivers are reminded during morning stretches to manage their loads so the trucks would not go overweight—his testimony was not corroborated by any other witness. And Martinez admitted that he was not aware of any written policy stating that the drivers are responsible for monitoring the truck's weight. (Tr. 2044–2045.)

Further, there was no precise way for the drivers to know when their truck was overweight. The amount of trash was not itself a reliable indicator (the trash could be heavy or light). And Athens had not installed an onboard weight scale or sensor on its trucks to let the driver know when the load had reached 12 tons. Nor did it teach the drivers how to know or feel the difference between a truck with a 12-ton load and a truck with a 13 or 14-ton load; it only taught them how to know and feel the difference between an empty truck and full truck. (Tr. 526, 529–530, 544–546, 1924–1925, 1958, 1979–1980.) Moreover, there is no credible evidence that Bermudez or any other driver had ever previously been asked to call in when they thought their truck was getting overweight, or that Naeole or any other field supervisor had ever sent out another truck to prevent a truck from going overweight. Finally, as noted below (fn. 52), thereare also significant problems with other aspects of Naeole's June 4 statement and hearing testimony about the events.

On balance, therefore, Bermudez' testimony on the point was more credible; Naeole did not tell him to call in when his truck was getting heavy. Further, even if Naeole had done so, Bermudez would not have heard or interpreted it in the same way Naeole testified he intended it. Rather, Bermudez would have heard and interpreted it simply as an acknowledgment that there was probably going to be a lot of trash that day and there was a good chance Bermudez' truck would not keep packing through the entire route.

finish the route with Pimental's truck. Naeole also then spoke to Pimental and likewise told him to do a truck switch with Bermudez at the cross-street.[52]

Pimental, however, had not yet arrived when Bermudez reached Phelan. So, because his truck was still packing, Bermudez continued into the next block. Pimental and his helper, Luis Prado, arrived shortly thereafter and pulled up behind him. Bermudez and Pimental then both got out of their trucks and discussed what to do. They agreed that, instead of switching trucks, Pimental would just finish the route with his own truck. Bermudez therefore returned to his truck, intending to drive it to the dump.[53]

Before he left, however, Naeole called him again. Naeole was out in a pickup truck collecting electronic and household appliance waste in the same area and had noticed both trucks parked on Huntington, one near the cross-street and the other farther down past Phelan. So he called Bermudez and asked if he and Pimental had switched trucks. Bermudez said no because his truck was still packing, and he thought it would save time and allow them to finish quicker. Naeole at this point realized that Bermudez had continued to collect trash beyond the Phelan cross-street instead of stopping and switching trucks with Pimental there as instructed. He told Bermudez that "there would be no need for supervisors if everyone made their own decisions" and instructed him to wait while he talked to Pimental. (GC Exh. 5; Tr. 1939–1942, 1966, 1969–1970, 1981–1983.)[54]

Naeole then called Pimental and asked why he hadn't switched trucks with Bermudez. Pimental blamed Bermudez, saying Bermudez hadn't wanted to switch. Naeole told Pimental he should have called and told him that. However, as there was only about a half-block left on the route, he told Pimental to go ahead and finish the route with his own truck. Pimental therefore did so and Bermudez drove his own truck to the dump as they had previously agreed. (Tr. 1942–1943, 1971.)[55]

In the meantime, Naeole called Operations Manager Martinez and told him what happened; specifically, that Bermudez had been insubordinate by not doing a truck switch with Pimental at the cross-street as instructed. Martinez, in turn, informed Leidelmeyer of the matter on Monday morning. Leidelmeyer told Martinez to get written statements from both Naeole and Pimental. He also asked to see the dump receipt showing how much Bermudez' truck weighed at the scale. (Tr. 1943–1944, 2022, 2079–2081.)

Per Leidelmeyer's request, Martinez obtained Bermudez' June 2 dump receipt. The receipt showed that the net weight of his truck was 14.36 tons, or 2.36 tons overweight. Martinez also asked Naeole to send him an email with all the details of the incident, and Naeole did so that same afternoon. As previously noted (fns. 51 and 52), Naeole's email recounted essentially the same events described above except for two significant details. First, it stated that, when he gave Bermudez his assigned route and map, he specifically told Bermudez "to let me know when he was getting heavy and I will send another truck to help." Second, it stated that, when he later called Bermudez to see how he was doing, Bermudez told him that his truck was not packing anymore. (GC Exh. 5; E. Exh. 27; Tr. 2020–2022.)

After receiving the email. Martinez spoke to Naeole again and asked for his recommendation. Naeole recommended that Bermudez be terminated because he was already on a final written warning for a behavioral/performance violation on April 27, 2017 (making "an indirect comment" that included "the 'N' word"). (Tr. 1945, 2022–2023; GC. Exh. 10.)

Martinez then also spoke with Leidelmeyer again and provided him with both the dump receipt and Naeole's statement. Martinez was apparently unable, however, to get a written statement from Pimental that day. So Leidelmeyer called Pimental directly and asked him what happened. Pimental confirmed that Naeole told him to switch trucks with Bermudez. (E. Exh. 27;

[52] Naeole testified, again consistent with his prior June 4 statement to Martinez, that Bermudez said his truck was no longer packing during this initial call (Tr. 1935–1936, 1963; GC Exh. 5.) However, Bermudez denied this, testifying, consistent with his own prior statement to the Company, that he told Naeole that the truck was still packing (Tr. 522–525, 642–643; GC Exh. 6.) Pimental also gave a statement to the Company on June 7 confirming that Bermudez told him that the truck was still packing when he arrived to do the truck switch (GC Exh. 30). And Naeole himself admitted that Bermudez told him the same thing when Naeole subsequently called Bermudez and asked why he did not switch trucks with Pimental (Tr. 1932–1934; GC Exh. 5). Accordingly, Bermudez' testimony on this point is more credible.

A different conclusion is warranted, however, with respect to whether Naeole specifically told Bermudez to do a truck switch with Pimental at Huntington and Phelan. Naeolo testified, consistent with his prior statement, that he did (Tr.1937–1938, 1963–1964; GC Exh. 5), while Bermudez testified, consistent with his own prior statement to the Company, that Naeole only said that he would send another driver to help (Tr. 534, 540 –541, 660; GC Exh. 6.) However, Pimental's June 7 statement confirmed that Naeole told him to do a truck switch with Bermudez (GC Exh. 30). Pimental's helper, Luis Prado (Tr. 707), who was called to testify by the General Counsel, also confirmed that Naeole told Pimental this. Accordingly, Naeole's testimony on this point is more credible.

[53] Bermudez testified that, before he talked to Pimental, Prado told him that Pimental did not want to help him, and that Pimental was the one who suggested not switching trucks (Tr. 531–532, 645–646, 657–658). This was consistent with Prado's testimony that Pimental told him on the way there he did not want to switch trucks with Bermudez, and that he spoke with Bermudez before Bermudez spoke with Pimental (Tr. 708–711). However, Bermudez did not mention this to Naeole on June 2, in his subsequent June 7 written statement, or during the investigatory interview with Liedelmeyer the same day. (Tr. 1987; GC Exhs. 6 and 31). This was a striking omission, particularly since the Company had informed the Union, and the Union had informed Bermudez, prior to June 7 that he was being accused by Naeole of insubordination for not switching trucks with Pimental (Tr. 668–670, 2133 –2135). Further, Prado was not an entirely disinterested witness. Like Bermudez, he was a union supporter and was himself later discharged by the Company (for being in the yard without a safety vest) in March 2019 (Tr. 700–702). Thus, considering all the circumstances, including the other problems with Bermudez' testimony discussed above, the most likely explanation is that it did not happen.

[54] To the extent there are slight differences between Naeole's account and Bermudez' account of this conversation, the former is more credible. However, for the reasons previously noted, no credit has been given to Naeole's testimony that he also specifically told Bermudez that he had wanted the trucks to switch to avoid Bermudez' truck being overweight (Tr. 1969). See also GC Exh. 5.

[55] Although Prado testified that Bermudez finished the route (Tr. 712–713), both Bermudez and Naeole testified otherwise (Tr. 532–533, 1943). See also GC Exh. 5.

Tr. 2026–2028, 2081.)[56]

Based on this information, Leidelmeyer concluded that Bermudez should be terminated. However, given that Bermudez was on the union bargaining committee in the ongoing contract negotiations, Leidelmeyer decided to confer with Executive Vice President Torres before going forward. He did so on or about June 5. He told Torres that Bermudez had been insubordinate by not following Naeole's instruction to switch trucks. At Torres' request, he also had Martinez send Torres the dump receipt, Naeole's statement, and Bermudez' prior disciplinary notices, including his 2017 and 2018 final written warnings for behaviorial/performance and safety violations. (Tr. 2082, 2090–2091, 2130–2131, 2146–2147, 2195; E. Exh. 28.)

After speaking to Leidelmeyer and reviewing the documents, Torres decided to inform the Union about the matter and schedule an investigatory meeting with Bermudez. He did so following a bargaining session on June 6. Torres invited the two union business representatives at the meeting into the caucus room and told them about the alleged insubordination incident on June 2; that a meeting was going to be held with Bermudez to get his side of the story; and that a union representative was welcome to attend. The union business representatives then returned and informed Bermudez about what Torres had told them. (Tr. 536–537, 665, 668–670, 2133–2136, 2196, 2248–2249, 2410–2411.)

The meeting with Bermudez was held the following day, June 7. Leidelmeyer, Martinez, and HR Generalist Elsa Alvarez were present for the Company. A union business representative was present for Bermudez. Leidelmeyer said they were there to get Bermudez' account of what happened and showed him Naeole's statement and the June 2 dump receipt. Bermudez disputed both of the two significantly different details in Naeole's statement. He denied that Naeole mentioned his truck being overweight or asked him to call when it was getting heavy. And he denied that he told Naeole that the truck was no longer packing when Naeole first called him. Moreover, he also denied that Naeole told him to stop working until Pimental arrived.

Bermudez then gave Leidelmeyer a written statement he had prepared before the meeting. The statement similarly denied that he told Naeole he was no longer packing and that Naeole told him to stop and switch trucks with Pimental. However, it confirmed that when Naeole subsequently asked him why he hadn't switched trucks, he replied that he "kept working like I always do because my packer was still packing." (Tr. 538–542, 639, 2030–2031, 2084, 2086, 2097; GC Exhs. 6, 31.)[57]

After reading Bermudez' statement, Leidelmeyer told Bermudez he was supposed to know when his truck was overweight. Bermudez replied that there was no way for him to know —that drivers are not scales—and that he had previously mentioned this to Alvarez during an employee meeting. He told Leidelmeyer that he believed he was being targeted by the Company because of his union activity. Leidelmeyer shook his head and said it had nothing to do with that. He then asked Bermudez if he had anything else to say, and Bermudez said no. So Leidelmeyer ended the meeting and told Bermudez he would be suspended pending further investigation. (Tr. 544–547, 2030–2031, 2087; GC Exh. 31.)

Sometime the same day, Pimental also provided a short written statement to the Company. It stated that Naeole called him after he finished his route and told him to go to Huntington and Phelan and trade trucks with Bermudez. But Bermudez told him that he still had space to pick up more trash and they didn't do the trade. Instead he finished Bermudez' route. (GC Exh. 30; Tr. 1973, 1985.)

Leidelmeyer met with Torres the following day, Friday, June 8. He informed Torres about both the meeting with Bermudez and Pimental's statement. They then discussed whether Bermudez should be terminated for insubordination in light of his previous final written warnings. Leidelmeyer recommended that he should be, given Pimental's statement confirming that Naeole had instructed him to switch trucks with Bermudez at Huntington and Phelan. Torres agreed. (Tr., 2088–2089, 2102–2103, 2138–2139, 2214–2215.)

Leidelmeyer and Martinez met with Bermudez a few days later, on Monday, June 11. Leidelmeyer told Bermudez he was being terminated and showed him the termination notice. The notice stated that Bermudez had violated company policy on June 2 by engaging in an "act of insubordination resulting in an extremely overweight trash load of 14.36 tons." Specifically, it stated:

> Insubordination—On Saturday, June 2, 2018, in anticipation of a heavy trash load due to the Memorial Holiday, Michael Bermudez was instructed by his supervisor, Kam Naeole to switch his service vehicle (911) with truck 369. This advance directive was to prevent the potential overweight situation I anticipated. The employee took it upon himself with blatant disregard to his directive and continued his route with his regular assigned vehicle. This action resulted in an unsafe work situation because the contents/material of the load came in grossly overweight 14.36 ton trash load. This directive was corroborated by the driver of truck 369 Jacinto Pimental. As part of the investigation, a statement was received by Mr. Bermudez and the secondary driver Jacinto Pimental.

The notice further stated that Bermudez was being terminated for his foregoing act of insubordination because of his "multiple" prior violations of company policy. Bermudez refused to sign the notice and the meeting ended. (GC Exh. 13; Tr. 548–549, 675–676.)

The parties agree that the proper framework for analyzing whether Bermudez' termination violated Section 8(a)(3) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989

[56] Martinez testified that he received Pimental's written statement on Monday, June 4 (Tr. 2025). However, it was not included with the other documents Martinez emailed to Torres on June 5. And it is was not signed by Pimental until June 7.

[57] Leidelmeyer testified that Bermudez did not verbally dispute Naeole's statement but simply handed him his prepared written statement (Tr. 2086). However, Bermudez testified otherwise, and his testimony is corroborated by the meeting notes that were apparently taken by Alvarez (whom the Company did not call to testify). See GC Exh. 31, and Tr. 2048–2050, 2097–2099, 2102–2104.

(1982). Under that framework, the General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that the employee's protected union activity was a substantial or motivating factor for the adverse employment action, i.e., that a causal relationship existed between the employee's union activity and the employer's adverse action against the employee. This necessarily includes, but is not limited to, establishing that the employee engaged in union activity and the employer knew or suspected it, and that the employer had animus against such activity. If the General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same adverse action against the employee even absent the union activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

Here, there is no dispute that all the supervisors and managers involved in terminating Bermudez knew that he was a strong union supporter and member of the union bargaining committee. Further, while there is no direct or compelling circumstantial evidence that all of them knew about Bermudez' allegation at the May 30 bargaining session regarding the company's involvement in the decertification petition, there is no dispute that Torres, who was at that session and made the ultimate decision to terminate Bermudez, knew about it.

The parties do, however, vigorously dispute whether there is sufficient evidence of animus and a discriminatory motive. The General Counsel argues that there is direct evidence of both based on (1) the Company's other violations, including Liedelmeyer's unlawful conduct at the March 21 meeting with Bermudez; and (2) Bermudez' uncontradicted testimony about certain comments Leidelmeyer and Naeole made to him during the 2–3 months prior to his termination (sarcastically referring to him as a "stupid shop steward" and "superstar," respectively).

However, as discussed above, the evidence fails to establish that Leidelmeyer unlawfully interrogated Bermudez regarding his union sympathies or solicited his help to decertify the Union at the March 21 meeting. And the only violations found (promulgating a rule prohibiting employees from talking to union representatives off the property while wearing their company uniforms and photographing employees who did so) were committed at a different facility, by different supervisors or agents, and were unintentional, based on a misunderstanding of the assistant general manager's instructions.

As for Leidelmeyer's and Naeole's sarcastic comments, Board precedent indicates that such comments may indicate animus under certain circumstances. See, e.g., *Harvey's Resort Hotel*, 234 NLRB 152 (1978) (employer's animus and antipathy toward union shop steward was established by, among other things, supervisor's statement to an employee that the shop steward "was stupid for getting involved in union activities."). Compare also *Luk, Inc*., 255 NLRB 976, 982 (1981); *Precast Mfg. Co*., 200 NLRB 135, 143 (1972); and *Screen Print Corp*., 151 NLRB 1266, 1276 (1965) (finding that various sarcastic comments were evidence of the employer's animus and discriminatory motive), with *Spector Freight System, Inc*., 141 NLRB 1110, 1123–1126 (1963) (finding that a manager's sarcastic and disparaging comments did not establish the employer's animus and a discriminatory motive under the circumstances). However, Bermudez failed to describe the circumstances. For example, with respect to Leidelmeyer's sarcastic "stupid shop steward" remark, Bermudez testified only that Leidelmeyer made the statement to him while he was outside the dispatch area with Naeole. He could not recall how the conversation started or provide any other details about it. See Tr. 681–688.[58]

The General Counsel also argues that there are a number of other, circumstantial factors indicating that the Company had union animus and a discriminatory motive. As discussed below, however, they are likewise insufficient, either individually or in combination, to carry the burden of proof.

Timing of discipline. As indicated by the General Counsel, the timing of Bermudez' termination, just 12 days after the May 30 bargaining session, is certainly suspicious. However, as indicated above, there is no direct or compelling circumstantial evidence that Naeole, Martinez, or Leidelmeyer, who were initially involved and forwarded the disciplinary matter to Torres, knew about Bermudez' allegation at that session. All three denied knowing anything about it (Tr. 1986, 2034–2035, 2091–2092). And both Torres and HR Vice President Pompay, who interviewed the employee identified by Bermudez the week following the May 30 meeting (June 4–8), denied telling any of them (Tr. 2142–2143, 2199, 2438–2441). Further, Bermudez admitted that Naeole, Martinez, and Liedelmeyer never mentioned the statement to him (Tr. 672).[59] Finally, as previously discussed, given Bermudez' prior final written warnings, Torres had no alternative under the Company's progressive disciplinary policy to terminating him. See generally *Queen of the Valley Medical Center*, supra, 368 NLRB No. 116, slip op. at 3 (all the surrounding facts must be weighed in evaluating whether the timing of an employer's alleged discriminatory adverse action is sufficient to infer animus).

False reasons for discipline. As noted above (fns. 51 and 52), it is highly unlikely that Naeole told Bermudez to call in when he was getting heavy, or that Bermudez told Naeole that he was no longer packing when Naeole called him, as Naeole asserted in his written statement and hearing testimony. And these assertions have been discredited. However, Leidelmeyer testified that Bermudez was not ultimately found to have been insubordinate by failing to call in when he got overweight or terminated for this reason (Tr. 2102–2103). And this is confirmed by the termination notice, which does not even mention that Naeole told Bermudez to call in when he was getting heavy (or that Bermudez subsequently told Naeole that he was no longer packing). Rather, it states only that Naeole told Bermudez to switch trucks

[58] Bermudez also testified that in early May 2018 Naeole berated him for not performing morning stretches with the other drivers, saying, "Who do you think you are?" "You're not better than no one else," and "You're not working as a team member." However, Bermudez admitted that Naeole did not refer to the union or his union activities. See Tr. 685–686.

[59] Bermudez testified that he nevertheless believed Leidelmeyer knew about the May 30 statement. However, the basis for his testimony was unclear and apparently derived from uncorroborated hearsay. See Tr. 673, 683–684, 696–698. Further, the General Counsel's brief does not rely on that testimony as evidence of Leidelmeyer's knowledge. Accordingly, the testimony has been given no weight.

with Pimental; that Naeole did so because he anticipated that Bermudez would be overweight; and that Bermudez disregarded Naeole's directive and continued on his route, which resulted in his truck being grossly overweight. Thus, the record indicates that Naeole's discredited assertions were not relied on by the Company in deciding to terminate Bermudez.

Cursory investigation of alleged misconduct. It is undisputed that neither Bermudez' helper (Mejia) nor Pimental's helper (Prado) was ever interviewed by Naeole, Martinez, or Leidelmeyer about the events on June 2. However, Martinez testified that the helpers are normally outside the truck making sure the trash is collected properly and thus would not hear the radio conversations (Tr. 2046).[60] Further, at no point did Bermudez say or suggest that either of the helpers could confirm his side of the story. Nor was there any other compelling reason to interview the helpers. Pimental himself confirmed orally to Leidelmeyer on June 2 and again in writing on June 7 that Naeole directed him to switch trucks with Bermudez at Huntington and Phelan. While this was not conclusive proof that Naeole told Bermudez the same thing, it was corroborative of Naeole's assertion that he did so. Moreover, Bermudez specifically admitted in his June 7 written statement that he did not switch trucks because his truck was still packing, which confirmed what Naeole had previously reported in his own statement that Bermudez had told him. In these circumstances, it cannot reasonably be found that the Company's investigation was superficial or one-sided. See generally *CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 33 (D.C. Cir. 2018), and cases cited there.

Deviation from normal disciplinary procedures. As indicated above, Leidelmeyer admitted that he consulted with Executive VP Torres because Bermudez was on the union bargaining committee. He testified that, for this reason, he wanted to "tread lightly" and to "make sure that all our t's were crossed and all our i's were dotted." However, Leidelmeyer testified that he had already decided that termination was appropriate, and he simply wanted to make sure Torres was "tight" with that decision. (Tr. 2090–2091.) And Torres corroborated this testimony. Cf. *Advanced Masonry Associates, LLC*, 366 NLRB No. 57, slip op. at 3 (2018) (finding that the safety director's unprecedented decision to consult the company owners regarding a disciplinary matter because one of the two employees involved was a union supporter and the election was a week away, after which the employees' one-day suspensions were escalated to discharges, was evidence that the employer's proffered reasons for their discipline were pretextual), affd. on point 781 Fed. Appx. 946, 967 (11th Cir. 2019). Further, the General Counsel's brief does not specifically argue that Leidelmeyer's decision to involve Torres is evidence of animus or an unlawful motive.

In any event, even assuming arguendo there is sufficient evidence that Bermudez' union activities were a motivating factor in his termination, the Company established that it would have terminated him regardless. The Company's employee handbook (as revised in April 2017) specifically stated that "insubordination, including but not limited to failure or refusal to obey the orders or instructions of a supervisor or member of management" was prohibited conduct (Jt. Exh. 60). And there is no substantial record evidence that the Company had not disciplined employees who were known by management to have committed such prohibited conduct in the past.[61]

Further, based on its investigation, the Company had a reasonable belief that Bermudez had insubordinately failed to switch trucks with Pimental at the cross-street as directed by Naeole. See *National Hot Rod Assn*., supra, 368 NLRB No. 26, slip op. at 4 ("In order to meet its burden under *Wright Line*, an employer need . . . only show that it had a reasonable belief that the employee committed the alleged offense and that it acted on that belief when it took the disciplinary action against the employee.").[62] This is so even though, as discussed above, the Company apparently concluded that there was insufficient evidence Naeole had expressed a concern to Bermudez about his truck being overweight before directing him to switch trucks at the cross-street. An employee's refusal to follow a supervisor's reasonable and lawful directive may be insubordinate even if the supervisor did not explain to the employee the reason for issuing it.[63] And there is no evidence that the Company had a different policy or practice.

Finally, as discussed above, given Bermudez' prior final written warnings, termination was the appropriate next step under the Company's progressive disciplinary policy for Bermudez' perceived misconduct.

Accordingly, the allegation will be dismissed.

C. Alleged Violation at Sun Valley Facility

The Sun Valley facility (also called Peoria) is the smallest, with about 15 unit employees. The complaint alleges just one violation at the facility.

Alleged April 19, 2018 discriminatory discipline of Damien Weicks for unacceptable conduct

Damien Weicks has worked as a bin painter at the Sun Valley facility since August 2017. At the time of the relevant events, he

[60] As previously noted (fn. 52), Prado testified that he did hear Naeole tell Pimental to switch trucks with Bermudez at the cross-street. (Although he testified that Naeole told Pimental to do so at the corner of Huntington and "Delano," he likely misremembered the cross-street. I take judicial notice, based on Google Maps, that there is no cross-street named "Delano" in that area. And while there is a Del Amo Boulevard, it is several blocks away and does not cross Huntington Lane.) However, the record indicates that they had recently finished their route. Thus, Prado did not need to be outside the truck at the time.

[61] Prado testified that he personally knew of several instances during his 3 years of employment at Athens where a driver did not follow a supervisor's instruction. And he provided an example (failing to go back and get a barrel and dump it) where Naeole was aware of it and talked to both him and the driver about it. (Tr. 718, 721–722.) However, Prado did not provide any details about why the driver did not follow Naeole's instruction, what the driver told Naeole afterwards, or whether the driver was disciplined. And the General Counsel's brief does not rely on his testimony.

[62] For the reasons previously discussed, it is unnecessary to address whether Leidelmeyer and Torres also had a reasonable belief, based on Naeolo's account, that Naeole told Bermudez to call in when he was getting heavy and that Bermudez insubordinately failed to do so.

[63] See, e.g., the State of California Employment Development Department (EDD) discussion of what constitutes insubordination for purposes of determining eligibility for unemployment compensation under the state code, at www.edd.ca.gov/uibdg/Misconduct_MC_255.htm.

was a known union supporter, was one of three employees at the facility on the union bargaining committee, and had been attending the contract negotiations for about 2 months. (Tr. 386–389, 419–421, 443, 1509; Jt. Exh. 62.)

On April 17, 2018, Weicks was painting a load of recently washed trash bins when he noticed that one of them still had grease on it that would prevent the paint from sticking to it. He therefore took the bin back to the wash line with a forklift. He then picked up another load of washed bins from the staging area and painted them. However, when he went back to the staging area for another load, he found the same dirty bin he had previously returned to be rewashed. So he picked it up with the forklift and returned it to the wash line again.

Weicks then returned to the staging area to pick up the new load. When he arrived, he saw the operations leadman, Luis Rubio, standing there talking to one of the welders. So he walked over and told Rubio what had just happened; that he had to take a dirty bin back to the washers twice to have it rewashed. Rubio asked Weicks if he had told the washers why he returned it, and Weicks said no because it was common sense and it was not his job to tell the washers what to do. Rubio responded that everyone needed to communicate as a team. Weicks replied, "That's why I'm telling you," and returned to the paint booth with the new load of bins.

After Weicks left, Rubio walked over to the wash line to look into the matter. He saw the dirty bin and pointed it out to the two washers, Miguel Lozano and Nelson Zelaya. They agreed that it still had grease on it but said Weicks hadn't talked to them about it.

Rubio at this point decided to get all three of them together. He told Lozano to go over to the paint booth and tell Weicks to join them at the wash line. When Weicks arrived, Rubio told him that things would work better if everyone communicated with each other. Weicks replied, "I don't speak with them, they are below (or beneath) me, I speak to management." Rubio told Weicks that there needed to be constant communication between everyone. Weicks replied that it was not his job to tell the washers how to do their job and returned to the paint booth.

A few minutes later, however, Weicks called Rubio over to the booth to speak with him in private. He told Rubio that he didn't want to talk to Lozano or Zelaya because they were "management boys" who got preference and believed they were better than everyone else. Rubio told Weicks that everyone was there to do a job and had to work together and communicate. Weicks replied that he was just going to paint and that's it. (Tr. 394–398, 454, 462, 1513, 1524, 1527, 1536; E. Exh. 14.)[64]

Rubio briefed Supervisor Eric Reese about the incident shortly after. He also gave Reese a detailed written statement setting forth the facts described above. Reese then called HR Manager Ramirez and informed her about it. Ramirez, in turn, called Rubio and asked him to email her a copy of his written statement, and he did so. (Tr. 1516–1517, 1598–1601, 1664–1668; E. Exh. 14.)

After reviewing the statement, Ramirez contacted the general manager at the facility, Enrique Gonzalez, and they agreed to interview everyone involved the following day. They met with Rubio first, who reiterated what he had previously reported. He also informed them that Lozano and Zelaya had become visibly upset when Weicks said he would not talk to them because they were "below" or "beneath" him. (Tr. 1599–1603, 1666–1669.)

Ramirez and Gonzalez then met with Lozano and Zelaya. They spoke to Lozano first and he confirmed what Rubio had reported; that Weicks said he and Zelaya were beneath him and he only spoke to management, and that he was very offended by Weicks' comment. They then met with Zelaya and he likewise confirmed what Rubio had reported. (Tr. 1603–1608, 1677.)

Ramirez and Gonzalez then met with Weicks. He admitted saying that Lozano and Zelaya were below him and he only spoke to management. He also would not acknowledge that there was anything wrong with saying that. Ramirez told Weicks that this was the problem; that he couldn't be saying things like that to people. Gonzalez likewise told him that it was disrespectful. (Tr. 407–410, 470–472, 478–480, 1609–1610, 1617–1618, 1678–1679.)

Based on the above information, and the fact that Weicks did not have any other discipline on his record, Gonzalez decided to issue Weicks a written warning. He and Ramirez presented the disciplinary notice to Weicks the following day, on April 19. The notice stated that he was being given a written warning for the following reasons:

> Employee stated that he is not going to communicate to other bin shop team members during the course of conducting business for the Company. The employee stated that certain employees were beneath him and that he only talks to management. This type of behavior and direct negative language is creating a [h]ostile work environment and is not acceptable per Athens Code of Conduct Policy. The company has zero tolerance for this type of behavior.

[64] To the extent Weicks' and Rubio's accounts conflict, more weight has been given to Rubio's primarily for two reasons. First, as discussed infra, Rubio wrote a detailed statement about the incident the same day (E. Exh. 14; Tr. 1510, 1517). Second, there are substantial reasons to doubt Weicks' account. For example, Weicks testified that he actually returned the dirty bin to the wash line four times; that the first three times Lozano looked at him and said to Zelaya, "man, this motherfucker"; and that the fourth time Lozana looked at him and called him a "fool" (Tr. 396–401, 454–462, 460, 463.) However, there is no mention of this in Rubio's detailed written statement. And both Rubio and HR Manager Ramirez, who subsequently interviewed Weicks, testified that he never mentioned that Lozano referred to him as a "motherfucker" or "fool" or otherwise cursed at him when he dropped off the dirty bin (Tr. 1512, 1532, 1618–1622). Julio Porres, the other bin painter at the time, likewise testified that Weicks didn't mention the washers cursing at him when he questioned Weicks about what had happened (Tr. 1481–1482). Further, there is no apparent reason why Lozano would have been so upset the first time Weicks brought back the dirty bin. The record indicates that Porres and previous bin painters regularly took dirty bins back to be rewashed, approximately once a day, and that Weicks only did so at most once a week. (Tr. 1520, 1534–1535.) Moreover, Weicks admitted that Lozano and Zelaya had never previously objected when he brought back a dirty bin (Tr. 459). Finally, the record indicates that profanity was common at the facility; that no one ever complained about it; and that Weicks himself used the terms "motherfucker" and "fool" (Tr. 1482–1483, 1506). Thus, even if Lozano did refer to Weicks as a "motherfucker" or "fool" when he dropped off the dirty bin, Weicks may very well not have mentioned it to Rubio or Ramirez.

Ramirez read the notice out loud and went over it with Weicks. Gonzalez also stated that Weicks was lucky it was only a written warning; that he could have been given a final written warning or terminated for such conduct. Weicks asked how long the written warning would stay on his record, and Ramirez said 2 years. Weicks then signed the notice without further comment. (Tr. 416, 1613–1624, 1681; GC Exh. 4.)[65]

Like Bermudez' termination, the General Counsel alleges that Weicks' discipline violated Section 8(a)(3) of the Act because it was motivated at least in part by his union activities. In support, the General Counsel again cites the Company's unfair labor practices at the other facilities. However, as discussed above, no violations have been found at the Torrance facility and the few 8(a)(1) violations found at the Pacoima facility fail to establish the Company's animus under the circumstances.

The General Counsel also cites the testimony of a former employee, Brendan Farris, about a meeting he had with HR Manager Ramirez prior to the subject incident. Farris was employed as a beginning welder at the facility from September 2017 until he was terminated for performance issues in May 2018. He was a work friend of Weicks and they sometimes ate lunch together. He testified that, in March 2018, Ramirez met with him and asked if he had seen or witnessed Weicks promoting or talking about the Union, and whether he felt Weicks was creating a hostile work environment. He said no; that he and Weicks only talked about cars or work or life and stuff like that. And that was the end of the meeting. (Tr. 599.)[66]

However, there are several problems with this testimony. First, Ramirez denied that she ever had such a meeting with Farris. She testified that she only met with him twice—about 30 days before he was terminated to discuss his performance and the day of his termination—and she never asked him about Weicks or his union activities. Indeed, she testified that she never even received any complaints about Weicks' union activities. (Tr. 1625–1628.) Second, Farris' testimony was not corroborated by any other direct or indirect evidence. For example, notwithstanding that they were work friends, there is no evidence that Farris ever told Weicks about the meeting with Ramirez. Third, given both his prior friendship with Weicks and his prior termination from the Company, Farris was not an entirely disinterested witness. Accordingly, his testimony about the meeting has not been credited.

Finally, there is also no substantial circumstantial evidence of animus and a discriminatory motive. Although Weicks had begun attending the contract negotiations 2 months before he was disciplined, there is no evidence or contention that he did or said anything during those bargaining sessions that might have prompted the Company to target him.[67]

In any event, even assuming arguendo the evidence establishes that Weicks' union activities were a motivating factor, the Company established that it would have issued him the written warning anyway. As discussed above, there is no dispute that Weicks told Rubio, in the presence of washers Lozano and Zelaya, that he would not talk to them because they were "below or "beneath" him. And the record includes several examples where the Company issued the same or more severe discipline to other employees at its three facilities for offensive or inappropriate comments or behavior in 2017 and 2018, notwithstanding that, like Weicks, they did not have any other behavioral/performance violations in the previous 2 years. See GC Exh. 10, and E. Exh. 16.

Accordingly, the allegation will be dismissed.

II. ALLEGED 8(A)(5) VIOLATIONS

A. Alleged August 2018 Unilateral Change Prohibiting Employees from Using the Pacoima Training Room During Breaks

As discussed in section I.A.6 above, since August 3, 2018 the Company has prevented employees at the Pacoima facility from using the training room during their meal breaks as they had been allowed to do in the past. The General Counsel alleges that the Company violated Section 8(a)(5) of the Act by doing so unilaterally, "without prior notice to the Union and without affording the Union an opportunity to bargain . . . with respect to this conduct and without bargaining with the Union to an overall good-faith impasse for an initial collective-bargaining agreement," citing *Bottom Line Enterprises*, 302 NLRB 373 (1991) (absent extenuating circumstances, an employer generally may not make unilateral changes in terms and conditions of employment during negotiations for an initial contract, absent an overall good-faith impasse in the negotiations).[68]

However, as discussed above, there were extenuating circumstances here. On August 2, the day before the Company locked the training room, the Union had repeatedly refused to comply with a variety of management and security directives, including a directive not to enter the training room. Given these circumstances, the Company's decision to begin locking the room on August 3 was not discriminatorily motivated in violation of Section 8(a)(3) of the Act. And the same circumstances excused the Company from giving the Union notice and an opportunity to bargain before doing so. Cf. *Phelps Dodge Copper Products Corp.*, 101 NLRB 360 (1952) (union's unprotected slowdown/partial strike in support of its contract demands suspended employer's duty to bargain over the contract).

The Company, however, was not excused from providing the Union with notice and an opportunity to bargain with respect to

[65] To the extent there are direct conflicts between Weicks' and Ramirez' accounts of the two meetings, Ramirez' account has been given greater weight for the reasons previously noted and because it is more consistent with the record as a whole.

[66] Without objection, Farris was permitted to testify by videoconference from the NLRB Resident Office in Birmingham, Alabama.

[67] Both Executive VP Torres and Attorney Abrahms testified on direct examination that Weicks raised or commented on at least one issue (a schedule change or some other change at the Sun Valley facility) at one or more bargaining sessions (Tr. 2126, 2248). However, they either did not identify or could not recall for certain whether he did so before or after April 17. And the General Counsel did not pursue the matter on cross-examination (or question Weicks about it) and does not rely on their testimony.

[68] The General Counsel does not allege that the Company violated Section 8(a)(5) of the Act by preventing the Union from continuing to meet with employees in the training room after August 2. Compare, for example, *Queen of the Valley Medical Center*, supra.

the decision's impact on the employees' terms and conditions of employment. See generally *International Bridge & Iron Co*., 357 NLRB 320, 322–323 (2011); and *AG Communication Systems Corp*., 350 NLRB 168, 172 (2007), and cases cited there (effects bargaining may be required even if bargaining over the decision is not). The Company gave the Union no such notice or opportunity. Although it told the Union that it was not allowed access to the training room, it never told the Union that employees would no longer be allowed access during their meal breaks as well. Further, while the employees themselves were made aware of the Company's new policy, the Board has held that notice to employees is not sufficient notice to the union. See, e.g., *Champaign Builders Supply Co*., 361 NLRB 1382, 1386 (2014), citing *Bridon Cordage, Inc*., 329 NLRB 258, 259 (1999).

The Company argues that it did not have a duty to bargain with the Union because there were other areas for the employees to take their meal breaks—including the common break area just outside the training room—and thus locking the room did not, in fact, have any material or substantial impact on their working conditions.[69] However, as indicated by the General Counsel, the Board in several cases has held that preventing employees from continuing to take meal breaks in a certain area constitutes a material and substantial change notwithstanding that they were provided alternative areas to do so. See *Indiana Hospital,* 315 NLRB 647, 655 (1994); and *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1191 (1986). See also *Blue Circle Cement Co., Inc.*, 319 NLRB 954 (1995), enf. denied in relevant part on other grounds 106 F.3d 413 (10th Cir. 1997).

The Company also argues that it had no duty to bargain with the Union for various other reasons, including (1) because the City of Los Angeles, through its franchise ordinance, "coerced" the Company into agreeing to a labor peace agreement providing for recognition based on a card check, and the Company therefore "did not truly voluntarily recognize the Union"; (2) because after the Company recognized the Union based on a card check, the employees "did not receive notice of the recognition and of the right to file a decertification petition"; and (3) because "based on uncontradicted reports [the Company] received," the decertification petitions that were filed on July 6, 2018 were "signed by a *majority* of the employees in their respective bargaining units," and the Union "refused to provide any . . . proof" otherwise (Br. 30–31).

However, there are numerous problems with these arguments. First, as previously discussed, the City's franchise ordinance did not require the Company to execute a card-check agreement, but only an agreement ensuring that there would not be any strikes or similar service interruptions due to labor disputes with the Union. The Company was "coerced" to agree to a card-check procedure only in the sense that the Company needed a labor peace agreement to obtain a franchise contract with the City, and the Union insisted on various favorable provisions, including a card-check procedure, as a condition of agreeing to one. See *Airline Service Providers Assn. v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017) (finding that a similar ordinance applicable to employers doing business at the Los Angeles International Airport was not preempted by federal labor law, notwithstanding the employer association's argument that it provided unions with a "powerful bargaining chip" to obtain benefits from employers in exchange for a labor peace agreement), cert. denied 139 S.Ct. 2740 (2019).

Second, recognition based on a card check is just as valid under Section 9 of the Act as recognition based on a secret-ballot election. See *Mine Workers v. Arkansas Oak Flooring Co*., 351 U.S. 62, 71–72 (1956). See also the Board's Notice of Proposed Rulemaking, Representation-Case Procedures, 84 FR 39930, 39938 (Aug. 12, 2019) ("voluntary recognition based on a contemporaneous showing of majority support" is an "undisputedly valid procedure").

Third, there is no legal authority holding that an employer's voluntary recognition of a union based on a card check is invalid unless the employees are notified thereafter of their right to file a decertification petition. Neither *Dana Corp*., 351 NLRB 434 (2007), the case cited by the Company, nor *Lamons Gasket Company*, 357 NLRB 739 (2011), which overruled *Dana Corp*., established any such rule or policy. Rather, the issue addressed in those decisions was whether employees should be allowed to file a decertification petition anytime following the employer's voluntary recognition of the union or, if they are provided notice of their right to do so, within 45 days thereafter.

Fourth, "the Board has consistently held that Section 10(b) of the Act precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union, occurring more than 6 months prior to the filing of unfair labor practice charges raising the issue, was invalid or unlawful." *Alpha Associates*, 344 NLRB 782 (2005), citing *Route 22 Honda*, 337 NLRB 84, 85 (2001); *Morse Shoe*, 227 NLRB 391, 394 (1976), supplemented by 231 NLRB 13 (1977), enfd. 591 F.2d 542 (9th Cir. 1979); and *North Bros. Ford*, 220 NLRB 1021 (1975). As indicated above, the Company recognized the Union based on a majority card showing in September 2017, approximately 11 months before the subject unilateral change.

Fifth, there is no evidence that the Company ever asserted any of its above arguments at the time of the relevant events; rather, it continued to voluntarily recognize and bargain with the Union over an initial contract before, during, and after. In these circumstances, the Company was "obligated to fulfill all aspects of its bargaining obligations," *T-Mobile USA, Inc*., 365 NLRB No. 23, slip op. at 2 (2017), enfd. mem. per curiam 717 Fed. Appx. 1 (D.C. Cir. 2018), including bargaining with the Union over the effects on employees of material and substantial changes in their

[69] The Company argues that there are also two other areas in the facility for the shop employees to take their meal breaks: a kitchen and a break area in the shop itself near the parts and supply department. However, the kitchen is located where the management offices are (GC Exh. 2), and there is no credible evidence that the shop employees were ever told they could use that area or that they ever did so. Although Martorana testified that he had seen shop employees in the kitchen (Tr. 1835), HR Manager Ramirez, whose office is near the kitchen, testified otherwise (Tr. 1649–1650). See also Jose Maldonado's testimony, Tr. 214 (no one ever said we couldn't use the kitchen, but none of us ever went in there). Further, when asked where the shop employees could take their meal breaks after the training room was locked on August 3, Martorna did not mention it. (Tr. 93, 215–216, 280–282). As for the break area in the shop, there is no evidence that it existed at the time of the relevant events. See Tr. 1651.

terms and conditions of employment.

Finally, there is no record evidence supporting the Company's assertion that the July 6, 2018 decertification petitions were signed by a majority of the employees in each unit or that the Company received any such reports. As indicated above, the petitions (Jt. Exh. 52–54) state only that they were supported by at least 30 percent of the unit employees. Further, all of the other testimonial and documentary evidence cited by the Company either does not support its assertion or is self-serving and uncorroborated hearsay. See Br. at 13, citing Tr. 2168–2170 (Torres), 2292–2294 (Attorney Abrahms), and 2455–2457 (Pompay), and E. Exh. 30 (a scripted presentation Attorney Abrahms prepared for a November 27, 2018 bargaining session with the Union). Thus, as far as the record shows, the Union has enjoyed a presumption of majority status at all relevant times. See *Levitz Furniture Co*., 333 NLRB 717, 725 (2001) ("[A]n employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees."). See also *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150, slip op. at 8 (2019); and *Alpha Associates*, above.

In short, the Company's arguments are without merit under current law. Accordingly, for the reasons discussed above, the Company violated Section 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain over the effects on employees of the decision to begin locking the training room on August 3.

B. Alleged March 2019 Bad Faith Withdrawal of Prior Contract Proposals

The final allegation is that the Company engaged in regressive bargaining in March 2019 in violation of Section 8(a)(5) of the Act by withdrawing its previous January 11, 2019 contract proposals to the Union. For the reasons set forth below, the record fails to support this allegation.

As previously discussed, the parties began bargaining for an initial contract in November 2017. Over the following year, they held 18 bargaining sessions, on November 30 and December 13, 2017, and January 16, February 8, March 12 and 27, April 6, May 11, 30 and 31, June 6 and 26–28, July 2 and 18, October 31, and November 27, 2018. (Jt. Exh. 1.)

All of the sessions were held at a local hotel and both sides were represented by multiple individuals. Attorney Abrahms and Executive VP Torres attended every session on behalf of the Company. Abrahms was the chief negotiator and spokesperson for the Company, and he communicated that to the Union. Torres had the sole authority to approve proposals and sign tentative agreements (after consulting with his management peers). Abrahms' associate, Attorney Christina Rentz, also attended many of the sessions, as did HR Vice President Pompay (one of the management peers Torres consulted). (Jt. Exh. 62; Tr. 858, 930, 935–938, 1046, 1103–1104, 2113, 2150–2151, 2157–2158, 2207, 2265–2269, 2443–2444.)

The Union's chief negotiators were Union President Phillips and Attorney Joe Kaplon, who handled collective-bargaining matters for the Union. At least one of them, or Kaplon's associate, Attorney Elizabeth Rosenfeld, attended every session. Also on the union bargaining committee were Business Representatives Jim Smith, Percy Martinez, and David Acosta, and at least two of them likewise attended every session. Ron Herrera, the Union's Secretary-Treasurer and ranking officer, also attended a few sessions, on March 27 and October 31, 2018. Organizers from the International Union attended several of the sessions as well. As previously discussed, several employees from each yard were also on the committee and a total of five to eight of them attended every session. (Jt. Exh. 62; Tr. 939–940, 1044–1045, 1087.)

Beginning on April 6, 2018, a federal mediator also attended every session (Jt. Exh. 62; Tr. 2266–2267).

At the outset, the parties agreed to negotiate language and noneconomic items before economic items. They also agreed to exchange proposals in writing. Over the entire year of bargaining, the Company never made an oral proposal at the bargaining table. The proposals

were always presented in writing. If any changes were agreed to after caucusing or in sidebar discussions, those changes were likewise immediately put in writing using a computer and printer the Company brought to all the bargaining sessions. (Tr. 919–920, 1105–1107, 1134– 1137, 1212, 2153–2158, 2261–2264, 2267–2268, 2443.)

Over the course of the year, the parties reached 18 tentative agreements, mostly with respect to language and other noneconomic items (Jt. Exhs. 1, 8). However, the parties failed to reach a tentative agreement with respect to union security, which was particularly important to the Union. The Union's initial proposal on November 30, 2017 included a standard clause requiring all employees to pay dues and fees as a condition of employment (Jt. Exh. 9). Whereas the Company's initial proposal did not include such a provision (Jt. Exh. 10). Abrahms stated at the time that the provision was omitted from the Company's proposal because he wanted to leave the issue to the end. He also later stated that the Company was opposed to such a provision because recognition had been granted based on a card check rather than an election, and because a large number of employees did not support the Union and wanted to decertify it. (Tr. 942–943, 949–950, 1167–1171, 2165–2166, 2287–2290.)

The parties also failed to reach tentative agreements with respect to any of the major economic items, such as wages and medical and retirement benefits. They first exchanged proposals on such items at the bargaining sessions on June 6 and 26–28, and they were substantially different.

For example, the Union proposed that healthcare insurance would be provided through the Teamsters Sanitary Industry Trust (TSIT) with the employer contributing $1278 per month per employee in the first year.[70] Although the specifics of the plan were not set forth in the proposal, the Union orally told the Company that the plan would provide employees with the same

[70] Although the initial proposals referred to the Western Alliance Trust Fund, this was likely a cut and paste error from prior Teamster contracts. See Tr. 1077, 2274–2275.

level of coverage and benefits as employees of Athens' competitors. The Union also provided the Company with a TSIT summary plan description. Based on this information, the Company understood that the Union's proposed TSIT plan would require only a $15 employee copay, provide 100 percent hospitalization and family coverage for all employees, and also include dental, vision, and chiropractic care.

The Company, on the other hand, proposed that the employees would remain in its group health insurance plan on the same basis as nonunit employees. That plan required a higher $30 copay and provided only 70 percent hospitalization. It also only provided full family coverage to the truck drivers; other employees had to contribute 50 percent for family coverage. However, it cost the Company only about $750 per month per employee, considerably less than the $1278 cost of the TSIT plan.

With respect to retirement benefits, the Union proposed that the employees would participate in the Teamsters pension fund, with the Company contributing $2.15 per hour per employee in the first year. The Company, on the other hand, proposed that employees would continue to participate in its 401(k) plan on the same basis as nonunit employees, with the Company matching employee contributions up to a maximum of 1 percent of the employee's gross earnings.

The parties' initial proposals were also far apart with respect to wage increases. (Jt. Exhs. 1, 31–34; E. Exh. 7; Tr. 950–955, 1024–1026, 1075–1077, 1143–1146, 1149–1150, 1162, 2159–2161, 2165, 2216–2217, 2270–2274, 2356, 2454, 2490.)

The parties made some movement on all these issues during subsequent bargaining sessions. For example, on July 2, the Company offered the Union a second option with respect to healthcare contingent on the Union agreeing to the Company's 401(k) retirement proposal. Specifically, if the Union agreed to its 401(k) proposal, the Company would agree to participate in the TSIT and contribute $650 per month per employee to the healthcare plan, with employees contributing the remaining premium balance. The Company also raised its proposed maximum contribution to the 401(k) plan to 1.5 percent on July 2, and to 2.25 percent on July 18, of the employee's gross earnings. (Jt. Exhs. 35–48.)

As for the Union, at the next session on October 31, it dropped its pension proposal in favor of the Company's 401(k) plan. However, the Union proposed a different contribution system. Specifically, the Union proposed that the Company would contribute $2.50 per hour per employee to the 401(k) plan instead of matching employee contributions. The Union also modified its healthcare proposal to reduce the Company's contribution to $1200 per month per employee, with employees paying the additional amounts if the Company's contributions were inadequate to maintain all of the benefits. (Jt. Exh. 49; Tr. 944.)

At the same session, in response to the Union's movement, the Company raised its proposed healthcare contributions to the TSIT under the second option to $700 per month per employee. And the Union responded to the Company's movement by reducing the Company's proposed 401(k) contributions to $2 per hour per employee in the first year. (Jt. Exhs. 50, 51.)

The next session—and the last session with the full bargaining teams—was on November 27. As indicated above, the parties at that time had made some progress but had not reached agreement on the terms of the healthcare and 401(k) plans or on wage rates. Union security was also still a sticking point. Abrahms began the meeting by addressing this last issue, telling Kaplon, Phillips, and the other members of the union bargaining committee that the Company was never going to agree to a union security clause unless the July 6 decertification petitions were unblocked by the Union's ULP charges and the employees had an opportunity to vote in an election. He said if the Union wanted to proceed with negotiations and try to finalize an agreement on the other open items that day, it would have to either withdraw its charges or withdraw its union security proposal.

Following a caucus, Kaplon flatly rejected both options. He and/or Phillips said the Union had other options, including taking the matter to City Hall and "the street." The conversation then became heated and descended into a shouting match. The parties therefore ended the meeting without any further bargaining. Contrary to past practice, they also did not discuss or schedule dates for future meetings. (E. Exh. 30; Tr. 873, 977–981, 1171–1182, 1186, 2167–2172, 2293–2297, 2456–2457.)[71]

However, the following month the Company began getting pressure from the City Council to reach a resolution with the Union. The Company was particularly concerned about this for two reasons. First, because the Company was seeking some price concessions from the City under the franchise contract at the time. And second, because the Union was asserting that the Company's alleged conduct violated both the Act and the LPA, which could jeopardize the franchise contract itself. The Company therefore directed Abrahms to see if he could come up with a path forward to reach a global resolution of both the contract issues and the Union's ULP charges. (Tr. 2172–2175, 2457–2459.)

Abrahms contacted Union Secretary-Treasurer Herrera shortly after and they agreed to meet over lunch at a local restaurant on January 4, 2019 to discuss the matter. Abrahms told Herrera at the meeting that he had an idea about how to get past the union security/decertification hurdle. The idea or concept was to combine a contract ratification vote with a decertification or "rejection" vote; that is, whatever contract the parties agreed to would be presented to the employees for ratification, and if they voted no, that vote would also be considered a rejection of the Union and it would walk away and no longer represent them.

Abrahms told Herrera that he had not yet run the idea by the Company. He also said that there were a number of legal and procedural matters that would likely need to be addressed to ensure the concept worked, including the Union's pending ULP charges and the decertification petitioners' pending petitions. But he indicated that he thought the idea was worth putting before the Union and the Company. Herrera agreed and said he would talk to Phillips about the idea. As for the related legal and procedural issues involving the pending charges and petitions,

[71] Abrahms testified that Kaplon actually said he thought the parties were at "impasse" (2476 – 2479). However, Abrahms' testimony was not corroborated by Torres. And Smith denied that there was any discussion of impasse at the meeting (Tr. 873). Further, Abrahms' scribbled notes from the session do not appear to mention any such declaration or discussion.

he said that Abrahms should talk directly with More, who handled such matters for the Union. (Tr. 1268–1270, 1275, 1278–1279, 1330, 1337–1345, 1382–1383, 1394, 2305–2308.)

Later that day or the next, Herrera told both Phillips and More about Abrahms' idea for a combined ratification/rejection vote and they agreed to it. Abrahms likewise presented the idea to the Company and it authorized him to continue exploring the concept with the Union and to put a global package together for its consideration. (Tr. 1279–1280, 1345–1346, 2177–2179, 2308, 2311, 2460, 2480.)[72]

Abrahms and Herrera subsequently spoke by phone and agreed to set up a meeting at the Union's office on January 11 after another meeting they had scheduled to discuss a contract with Araco, a sister company of Athens. They agreed that it made sense to start with the open contract issues before addressing the details of the ratification/rejection vote and the pending ULP charges and decertification petitions. They both understood, however, that a contract was only one part of the global resolution and was contingent upon the parties reaching agreement on the other parts. (Tr. 1279, 1395, 1399, 2310, 2311–2313.)

Herrera subsequently informed Phillips and Business Representative Smith of the meeting and requested them to attend the January 11 meeting on behalf of the Union. However, given the nature of the discussions—that they would just be discussing what it would take to get to a final agreement rather than exchanging proposals—no arrangements were made to have any of the other members of the union bargaining committee present. (Tr. 877, 904–905, 984, 987, 994.)[73] Torres and Pompay likewise decided not to attend on behalf of the Company for essentially the same reason, i.e., because the meeting was preliminary and exploratory, and the Company did not intend to approve anything without reviewing the entire package. (Tr. 2181–2182, 2186, 2207, 2460–2461.)[74]

The meeting occurred at the Union's office several days later as scheduled. As indicated above, only Abrahms and Phillips and Smith attended. Herrera was there briefly at the beginning but left the room before the substantive discussion began. None of the other members of the respective bargaining teams were present. Nor was a federal mediator. (Tr. 987–988, 1047 –1050, 1203, 1310, 1350–1351, 2310.)

Abrahms began the meeting by going through each of the approximately 10 open contract issues and indicating what he understood, from prior discussions with Torres and other Athens executives, that they would or might agree to if there was a combined ratification/rejection vote on the contract and the other legal and procedural issues were also resolved.[75] With respect to the four major issues—union security, healthcare, retirement, and wages—Abrahms stated as follows.

Union security. Abrahms said the Company would be okay with the union security clause that had been previously proposed by the Union (GC Exh. 16 (Smith's notes); E. Exh. 31 (Abrahms' notes); Tr. 879–880, 1054–1055.).

Healthcare. Abrahms said that the most the Company would be willing to contribute to the TSIT was $950 in the first year, and $1024 and $1100 in the second and third years.[76] Phillips and Smith responded that they thought $950 would work; that PacFed, the TSIT administrator of the Kaiser healthcare plan, could put together a plan using that number which would be equal to or better than what Athens currently offered its

[72] Phillips testified that he was not told about Abrahms' ratification/rejection idea until much later, in March 2019 (Tr. 1193–1194). However, Herrera testified that he told Phillips about it immediately after the January 4 meeting with Abrahms.

[73] Smith and Phillips testified that there may have been other reasons for not having the full union bargaining committee there; for example, because the meeting was scheduled with little notice or because they expected the meeting to be either too short or too long (Tr. 904, 1009, 1050). However, the record as a whole indicates that the actual reason was another possibility Smith mentioned: that "sometimes you just want to have, like a frank discussion with the employer and hammer out some issues and just discuss what it would take to get a final agreement" (Tr. 905).

[74] Herrera and Abrahms gave conflicting testimony about whether Abrahms expressly told Herrera during their phone conversation or before the January 11 meeting began that he had no authority to make proposals. However, regardless of whether Abrahms did so, a preponderance of the evidence indicates that it was otherwise obvious from the content and context of their phone conversation and understood by Herrera.

[75] There is no direct evidence where Abrahms' numbers on the open economic items came from. Abrahms never revealed the source in his testimony. And Torres testified that he did not know where Abrahms got his numbers from; that there were no discussions with Abrahms prior to the meeting about the specific contract terms the Company would agree to as part of a global resolution (Tr. 2177–2179, 2207–2209). However, Torres' testimony was inherently unbelievable and otherwise exhibited characteristics of false or misleading testimony. See fn. 9, above. See also *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (variation in a witness' demeanor and voice tone or inflection may justify disbelieving a witness); and *Flamingo Hilton-Laughlin*, 324 NLRB 72, 99 (1997) (discrediting witness whose voice "wilt[ed] to a near-whisper in response to critical questions"), enf. denied in part on other grounds 148 F.3d 1166 (D.C. Cir. 1998). It is therefore reasonable and appropriate to infer that Torres or other Athens executives with decisional authority did, in fact, tell Abrahms prior to the meeting the maximum amounts the Company would agree to on healthcare, retirement, and wages pursuant to a global resolution that included the ratification/rejection concept. See *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015); and *NLRB v. Howell Chevrolet*, 204 F.2d 79, 86 (9th Cir.) affd. 346 U.S. 482 (1953) (where witnesses are discredited, the trier of fact may find, not only that their testimony was untrue, but that the truth is the opposite of their testimony).

[76] Both Phillips and Smith testified that Abrahms said he was "authorized to offer" these amounts, as well as the other amounts he said the Company would agree to on retirement and wages (Tr. 996–997, 1049, 1060, 1211, 1214–1218, 1221–1224, 1229–1230.). However, it is unlikely that Abrahms, an experienced labor lawyer and negotiator, would have used such language under the circumstances. As discussed above, the record indicates that his client did not consider the meeting to be a bargaining session or an exchange of proposals and did not want to approve anything until an entire package or global resolution had been prepared and presented. Moreover, this was not the only instance where Phillips put words in Abrahms' mouth. For example, he also repeatedly testified that Abrahms gave him and Smith the Company's "bottom line" numbers. However, on further examination he admitted Abrahms did not actually use the term "bottom line" but said the amounts were the most his client was willing to pay. (Tr. 1049, 1060, 1069, 1215–1218, 1229.). See also fn. 79, below.

employees. They said they would give the number to PacFed and Kaiser to prepare such a plan. (GC Exh. 16; E. Exh. 31; Tr. 1051–1053, 1072– 1073, 1079–1081, 1230–1233, 2315–2318.)[77]

Retirement. Abrahms said that the most the Company would be willing to contribute to the 401(k) was 2 percent of each employee's gross wages plus a 50 percent match for voluntary employee contributions up to 6 percent of gross earnings. (GC Exh. 16; E. Exh. 31; Tr. 882–883, 2326–2327.)

Wages. Abrahms indicated the maximum total amount the Company would be willing to pay. He, Phillips, and Smith then went through and discussed the amount for each classification one by one. There was some back and forth with respect to a few of the classifications, with Phillips indicating what the Union wanted and Abrahms indicating what he thought the Company might agree to as long as the total remained the same. (GC Exh. 16; E. Exh. 31; Tr. 888, 1053–1054, 1218–1227, 2323–2326.)

The three of them then discussed various other parts of the global resolution or package. Phillips told Abrahms that he didn't believe the Union would be looking to pursue or move forward on the ULP charges if they reached an agreement. They also discussed the pending decertification petitions and whether and how they could get the petitioners to agree to a ratification/rejection vote as an alternative to a decertification election and withdraw their petitions. Finally, they also briefly discussed how the vote would be conducted, including the location and whether it would be supervised by a neutral arbitrator. They agreed these were issues that needed to be further addressed as the parties moved forward. (E. Exh. 31; Tr. 1056– 1059, 1251–1254, 1082, 2328–2330.)

The meeting at that point ended. Abrahms told Phillips and Smith that he would take what they had discussed back to his client. And they all agreed to be in touch. (Tr. 2331, 2349.)[78]

Following the meeting, Phillips contacted PacFed and Kaiser about creating a healthcare plan that would work with a $950 "break-in" employer contribution amount. Unfortunately, it took some time to get the process going, in part because Kaiser (which was also the provider under the Company's healthcare plan), needed certain information and/or authorizations from the Union and the Company to develop rates for the TSIT. The necessary information and authorizations were eventually provided by February 11. (E. Exhs. 10, 32; GC Exhs. 17, 18.)

In the meantime, a number of things occurred that began to erode the Company's interest in reaching a global resolution with the Union. Most significantly, as the weeks passed, the Company received or felt less pressure from the City Council to resolve the disputes with the Union and became less concerned about their impact on the franchise contract. In addition, the Company began getting reports that union business representatives were falsely telling employees that a tentative deal had been reached and they would be voting in a couple weeks. Abrahms texted Herrera on February 7 and 14, saying that he hoped the reports were not true as they were "pushing my folks in the opposite direction" and were "not helpful." Herrera responded saying, "[I] hope they aren't either let me [check] on that." (E. Exh. 13, pp. 5, 8, 10; Tr. 2359–2365, 2368.)[79]

Eventually, on February 21, PacFed emailed Smith and Phillips a description of the TSIT plan that had been prepared using the $950 contribution rate. Herrera emailed Abrahms a copy of the plan summary a few days later, on February 25. The plan matched the Company's current plan with some improvements, including family coverage for all employees and dental, vision, and chiropractic care. However, it was significantly worse than the TSIT plan covering employees at Athens' competitors, which the Union had previously proposed. For example, like Athens' current plan, it provided 70 percent rather than 100 percent hospitalization, and doubled the copay from $15 to $30. (GC Exh. 21; Tr. 1242–1244, 2354.)

The Company was not pleased with the PacFed TSIT plan. Although the plan required the Company to pay $200 more per month per employee than it contributed under its existing plan, it included the same lower hospitalization coverage and higher copay as the existing plan. And while it provided full family coverage to all employees rather than just the drivers, the Company had never had an interest in doing so. Further, the Company's broker advised Pompay that it could provide a plan that likewise included dental and vision to all Athens employees, including the unit employees, for over $100 less ($840). It also orally advised Pompay that removing the approximately 400 unit employees from the current pool could increase the Company's premium for the remaining 1100 Athens employees. Finally, the PacFed plan summary did not indicate what the costs would be in the second and third years, and the Company was concerned that it would get caught in a "bait and switch" with costs rising significantly after the first year. (E. Exh.13, pp. 13–14; E. Exh. 38; Tr. 2355–2358, 2468–2470, 2483–2486.)

[77] Abrahms denied that Phillips and Smith said anything about developing a plan to fit with the $950 contribution amount—that the only thing they said was that they thought the $950 would work but had to check with PacFed—and it was his understanding that they would be checking to see if the $950 would work with the plan that had been previously discussed (Tr. 2317–2318). However, as indicated by the General Counsel, this makes no apparent sense. The previously discussed plan required an employer contribution of over $1200 per month per employee. And there would be no need to check with PacFed and Kaiser to see if the $950 employer contribution rate would work if the employees were going to pay the $250-plus difference. See also Phillips' subsequent January 22 email to PacFed, E. Exh. 10 (requesting "the Kaiser pricing matching the attached Athens benefits at the former Recology location").

[78] Smith denied that Abrahms said he had to run everything by his client. However, he also denied, contrary to Abrahms and Phillips, that they discussed the pending ULP charges and decertification petitions. (Tr. 1005.) As for Phillips, he testified that Abrahms said he would take their "agreement" back to his client (Tr. 1060). However, as previously discussed (fn. 77), it is unlikely Abrahms would have used such language under the circumstances. Further, nothing they discussed at the meeting had been put into a written proposal or TA'd. And the General Counsel does not allege that any agreement was reached at the meeting (Tr. 1240, 1424). See also *Heidelberg Distributing Co*., 364 NLRB No. 148, slip op. at 11–15 (2016) (finding, under similar or analogous circumstances, that no agreement had been reached on a global settlement so as to create a binding contract).

[79] I take judicial notice, based on the Los Angeles Sanitation & Environment website (www.lacitysan.org) that Athens and the City executed an amendment to the franchise contract on February 25 and March 1, 2019, respectively.

Abrahms notified Herrera of these concerns by phone and text after receiving the PacFed summary. He warned Herrera that he was getting "A LOT of push back" from the Company. Herrera responded that he "didn't expect nothing less than push back," wished Abrahms luck, and said to let him know what he needed him to do. (E. Exh. 13, p. 14; Tr. 1282, 1285, 1288, 1353.)

A few weeks later, on March 11, Abrahms called Herrera and informed him that the Company was definitely not going to agree to the PacFed TSIT plan as part of the global resolution for the reasons previously discussed. Abrahms also said the Company was not going to agree to the wage rates that had been discussed on January 11 for some of the classifications; that the Company wanted to reduce them by 10 cents. Abrahms said that he would put the Company's position in writing. Herrera expressed disappointment and suggested another meeting. (Tr. 1288–1294, 1301–1302, 2375–2376, 2425–2427.)[80]

Abrahms met with Herrera and Phillips at the Union's office a few days later, on March 15. He showed them a draft of the Company's "global resolution" proposal and explained to Phillips, as he had previously to Herrera, why the Company would not agree to the PacFed TSIT plan and some of the wage rates they discussed on January 11. He also emailed them a copy of the proposal 2 days later, on March 17. Consistent with the January 11 discussion, the proposal included a union security provision. It also provided that the Company would contribute 2 percent of each employee's gross wages to the 401(k) plan plus a 50 percent match for voluntary employee contributions up to 6 percent of gross earnings. However, it provided that employees would continue to participate in Athens' current healthcare plan on the same basis as the nonunit employees. It also provided for lower wage rates in certain classifications than were discussed on January 11.

The Company's proposal also addressed the remaining parts of the global resolution. With respect to the pending ULP charges and decertification petitions, the proposal stated that they would have to be withdrawn by the Union and the petitioners, respectively. Regarding the combined ratification/rejection vote, the proposal stated that it would be held by secret ballot, on a per yard basis, at neutral locations, and supervised by arbitrators. It further provided that a "yes" vote at a yard would mean the contract would be ratified and the Company would continue to recognize the Union at that location, and that a "no" vote at a yard would mean the Company would withdraw recognition and the Union would disclaim interest in representing the employees at that location. Finally, it also addressed various other details regarding the conduct of the election.

Abrahms' email to Herrera and Phillips stated that the Company's foregoing proposed global resolution was being provided to the Union "for discussion purposes and should be treated as confidential settlement discussions." It further stated that the proposal likely provided the best contract for the unit employees that could be obtained. Finally, it stated that, "barring a global resolution along these lines," Athens would "return to the [bargaining] table with [its] last formal proposal[] and [the parties] can attempt to complete negotiations . . . there." (E. Exh. 11; Tr. 2376–2377, 2428–2429, 2378–2379.)[81]

The Union declined to revisit the contract terms discussed on January 11. Instead, it filed the instant unfair labor practice charge alleging that the Company's March proposal effectively withdrew proposals made by the Company on January 11 and constituted unlawful bad faith regressive bargaining. (Tr. GC Exh. 1(s), (x); E. Exh. 12; Tr. 1248–1250.)

The record evidence, however, fails to establish that the Company actually made any contract proposals on January 11. As indicated above, the discussions between Abrahms and union representatives Phillips and Smith that day were nothing like any of the previous bargaining sessions between the parties. The full bargaining teams did not attend and no written proposals were prepared or exchanged. Further, the discussion of the open contract terms occurred in the context of a global resolution that included a combined ratification/rejection vote and withdrawal of the pending ULP charges and decertification petitions. And Abrahms never stated during the meeting that he had authority to propose or agree to specific terms as part of such a global resolution. Rather, he stated only what he understood to be the most the Company would or might agree to as part of a global resolution and indicated that the Company would have to review and approve whatever they discussed.

In short, as Abrahms testified, the January 11 discussions were "akin to" preliminary litigation settlement discussions where opposing counsel "talk[] about what [their] clients might be willing to do if [they] move closer to one another" (Tr. 2348). See *Universal Stabilization Technologies, Inc. v. Advanced Bionutrition Corp.*, 2018 WL 3993369, at *5 (S.D. Cal. Aug. 21, 2018) ("[I]t is often necessary for parties to participate in multiple negotiating sessions before the parties are ready to begin exchanging formal settlement offers."), quoting *In re Gardens Regional Hospital and Medical Center, Inc.*, No. 16-bk-17463-ER, 2017 WL 2889633, at *5 (C.D. Cal. July 6, 2017).[82]

[80] To the extent Herrera's testimony about the March 11 phone call suggests that Abrahms had made proposals to or reached an agreement with Phillips and Smith at the January 11 meeting, it has not been credited for all the reasons previously discussed (and because Herrera did not participate in the meeting).

[81] The global proposal also included the Company's position with respect to the separate Araco contract negotiations.

[82] The Company also argues for this reason that all of the underlying evidence regarding Abrahms' combined ratification/rejection idea and the global resolution or settlement discussions is inadmissible under FRE 408 (Compromise Offers and Negotiations), citing *Contee Sand & Gravel Co.*, 274 NLRB 574 n. 1 (1985), and *St. George Warehouse, Inc.*, 349 NLRB 870, 872–875 (2007). The Company initially made this argument in a prehearing motion in limine, which I denied on the ground there were material facts in dispute regarding the nature of the parties' discussions following the November 27, 2018 bargaining session. See my July 30, 2019 order (citing *EEOC v. Autozone, Inc*., 2008 WL 5245579 (D. Ariz. Dec. 17, 2008)). The Company also again made the argument in a motion to dismiss at the close of the General Counsel's case in chief, which I denied because the General Counsel had presented testimony that, if credited, would undermine the Company's argument, and I had not had an opportunity to fully evaluate all the supporting emails, text messages, and other exhibits (Tr. 1438–1443). Finally, the Company also again makes the argument in its posthearing brief. And, as discussed above, I have now concluded, after carefully reviewing the entire record, that the parties were engaged in global settlement

Moreover, even assuming that Abrahms did make contract proposals on behalf of the Company at the January 11 meeting, the evidence fails to establish that the Company unlawfully later withdrew those proposals. The relevant test for evaluating such regressive-bargaining allegations is whether "the totality of the employer's conduct and the circumstances" indicate that its regressive proposals were "made in bad faith or [were] intended to frustrate agreement." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). Relevant factors include the parties' bargaining history; the timing of the employer's regressive proposals; whether the employer's bargaining position was strengthened or there were changed economic or other circumstances prior to the regressive proposals; the union's own conduct, including whether it likewise made less favorable proposals or failed to make concrete bargaining proposals, before the employer made its regressive proposals; whether and how the employer explained the regressive proposals; whether the employer's explanations were illegitimate, illogical, or unreasonable; and other evidence of the employer's intent. See id., slip op. at 4–5; *Whitesell Corp*., 357 NLRB 1119, 1144, 1149–1150 (2011); *National Steel and Shipbuilding Co*., 324 NLRB 1031, 1042 (1997); *Rescar, Inc*., 274 NLRB 1, 2 (1985); *Pipe Line Development Co*., 272 NLRB 48, 49–50 (1984); and *Barry-Wehmiller Co*., 271 NLRB 471 (1984); and cases cited there.

Here, there is no allegation that the Company had not bargained in good faith over the previous year, from November 30, 2017 through November 27, 2018. Further, the history of bargaining during that period indicates that there likely never would have been a January 11 meeting if the Union had not taken the matter to the City Council and the Company had not contacted the Union to explore ways the parties could get past the union security/decertification hurdle that had brought negotiations to a standstill at the November 27 meeting and resolve the Union's pending ULP charges. Absent those initiatives, the parties might never have moved beyond their previous October 31 proposals.

In addition, as discussed above, a number of significant changes or events occurred during the 2 months following the January 11 meeting. First, as the weeks passed and the Company weathered the Union's corporate campaign, it began feeling less pressure to accede to the Union's demands. Second, the Company was informed that union business representatives were falsely telling employees that the Company had in fact acceded to the Union's demands and that the parties had reached a tentative agreement. Third, the Union ultimately provided the Company with an unsatisfactory and incomplete healthcare proposal, the primary open contract issue that had delayed reaching any such agreement following the January 11 meeting. Fourth, the broker for the Company's existing healthcare plan advised that it could provide a plan with dental and vision coverage for over $100 less per month per employee than the cost of the Union's plan and predicted that removing the unit employees from the existing plan would increase the Company's cost for the remaining employees. The record indicates that Herrera was aware of or was specifically told by Abrahms about all of these circumstances and concerns. And, considered in combination, they were not plainly illegitimate, illogical, or unreasonable grounds or reasons for the Company to modify its position.

Finally, there is no other substantial direct or circumstantial record evidence of bad faith or an intent to frustrate agreement. Contrary to the General Counsel, the evidence fails to establish that the Company "engaged in a course of conduct at its yards designed to discourage pro-Union activity and interfere with [their statutory] rights" (Br. 122). Rather, as found above, it establishes only that, over 6 months earlier, at one of the three facilities, the Company had committed a few 8(a)(1) violations due to a miscommunication and misunderstanding and had failed to bargain over the effects of preventing employees from continuing to use the training room for meal breaks.

Accordingly, the allegation will be dismissed.

CONCLUSIONS OF LAW

1. The Company committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

a. Engaging in surveillance and creating the impression that it was engaging in surveillance of its employees' union activities at the Pacoima facility on July 12, 2018.

b. Orally promulgating a rule on July 12, 2018 prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms.

2. The Company also committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects of its August 3, 2018 unilateral decision to lock the training room at the Pacoima facility and no longer permit employees to take their breaks there.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Company did not otherwise violate Section 8(a)(1), (3), and (5) of the Act as alleged in the consolidated complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[83]

ORDER

The Respondent, Arakelian Enterprises, Inc. d/b/a Athens Services, Los Angeles, California, its officers, agents, successors,

discussions following the November 27 bargaining session. However, it is not clear that *Contee* and *St. George Warehouse* support the Company's position. In those cases, the complaint allegations that arose from the settlement negotiations (8(a)(5) refusal to execute a new contract and 8(a)(5) surface bargaining, respectively) were closely intertwined with the prior ULP charges the parties were attempting to settle (8(a)(5) failure to abide by the existing contract and 8(a)(5) surface bargaining, respectively). That does not appear to be the situation here. Compare *Cirker's Moving &* Storage Co., 313 NLRB 1318, 1326 (1994); and *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293–1294 (6th Cir. 1997), enfg. in part 320 NLRB 71 (1995) (FRE 408 does not exclude offers or statements made during settlement negotiations to prove liability for an unfair labor practice that is independent of and different than the unfair labor practices that were the subject of the settlement negotiations). In any event, given my finding above that the Company made no proposals at the January 11 meeting, it is unnecessary to address the Company's additional FRE 408 argument.

[83] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance or creating the impression that it is engaging in surveillance of its employees' union activities.

(b) Promulgating rules that prohibit employees from speaking to union representatives off the property while wearing their uniforms.

(c) Failing and refusing to bargain in good faith with Teamsters Local 396 as the exclusive bargaining representative of its employees in the following bargaining unit:

> All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Laborer, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its July 12, 2018 oral rule prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms and notify all employees at the facility that it has done so.

(b) On request, bargain in good faith with the Union to an agreement or valid impasse over the effects of its August 3, 2018 decision to lock the training room and no longer permit employees to use the room during their breaks.

(c) Within 14 days after service by the Region, post at its Pacoima facility in Los Angeles, California copies of the attached notice marked "Appendix" in both English and Spanish.[84] Copies of the English and Spanish notices, on forms provided by the Regional Director for Region 31, shall be signed by the Respondent's authorized representative and posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of this proceeding, the Respondent has gone out of business or closed the Pacoima facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since July 12, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., December 30, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance or create the impression that we are engaging in surveillance of your union activities.

WE WILL NOT promulgate rules that prohibit you from speaking to union representatives off the property while wearing your uniforms.

WE WILL NOT fail and refuse to bargain in good faith with Teamsters Local 396 as the exclusive bargaining representative of our employees in the following bargaining unit:

> All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Laborer, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind our July 12, 2018 oral rule prohibiting you

[84] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

from speaking to union representatives off the property while wearing your uniforms and notify all employees at the facility that we have done so.

WE WILL, on request, bargain in good faith with the Union to an agreement or valid impasse over the effects of our August 3, 2018 decision to lock the training room and no loner permit you to use the room during your breaks.

ARAKELIAN ENTERPRISES, INC., D/B/A ATHENS SERVICES

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/31-CA-223801 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.